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RACE, "THE RACE," AND THE REPUBLIC: RE-CONCEIVING JUDICIAL AUTHORITY AFTER *BUSH V. GORE*

Larry Catá Backer[+]

INTRODUCTION

La vendetta, oh, la vendetta,
è un piacer serbato ai soggi,
l'obliar l'onte, gli oltraggi
è bassezza, è ognor viltà.
Coll'astuzia . . . Coll'arguzia,
coll' giudizio, col criterio . . .
Si protebbe . . . il fatto è serio
ma credete si farà.
Se tutto il codice dovessi volgere,
se tutto l'indice dovessi leggere,
con un equivoco, con un sinonimo,
qualque garbuglio si troverà.
Tutto Siviglia conosce Bartolo,
il birbo Figaro vinto sarà.[1]

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1. Vengeance, oh vengeance
Is a pleasure meant for the wise;
to forgo insults and outrage,
is base and utterly repugnant.
With astuteness. . . With cleverness
With discretion, with judgment
if possible. . . Its attainment is important;
but believe me, it will be done.
If I have to pore over all the law books,
If I have to read all the case notes,
with equivocation, with analogy,
some sort of impediment can be found.

The most serious threats to the stable organization of a republic usually do not arise from foreseeable dangers because the institutions of a republic are well crafted to guard against these dangers. The nation deployed its great resources to guard against an assault to the integrity of the national electoral process in the wake of the contested election of November 2002. The result, the Supreme Court's decision in *Bush v. Gore*,[2] settled the election. Much has been written about that great deployment of resources and the reforms that, as a result, may come to pass.[3] It is not my intention to add to that study or to comment on the central criticisms of the Supreme Court's actions in *Bush v. Gore*.

Instead, my focus is on the great, yet indirect and less visible, consequences of the deployment of resources that led, with a minimum of conflict, to the installation of a national leader in 2001. That deployment of resources in the courts has opened a space in which other battles over the nature and character of our political system might be fought, away from the glare of any public spotlight. This article will examine the profound and unintended consequences of the 2000 presidential election on the nature of judicial authority and the relation between judicial authority and the authority of the legislative branch. These consequences, and their potential future effect, remind us that the fundamental character of a republic is not necessarily transformed through any great act of treachery or revolutionary conflict, or even through any great public debate. Rather, the political character of a

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All Sevilla knows Bartolo,
that villain Figaro will be defeated.

Lorenzo da Ponte, Le Nozze di Figaro, Act I. No. 4 Aria (Bartolo), music by Wolgang Amadeus Mozart (1786). In this well-known aria, Don Bartolo explains the necessity of vengeance, as well as the utility of statutory and judicial manipulation in furtherance of its design. The object of vengeance in this case is Figaro, who is to marry Suzanna. The character of the vengeance is symmetrical. Just as Figaro thwarted Don Bartolo's marriage to Rosina in favor of a rival, now Bartolo will do to Figaro what Figaro had earlier done to him. That symmetry of revenge finds significant echo throughout the article that follows. In the opera, Don Bartolo's revenge leads to a series of unintended but important consequences. The unintended consequences of revenge are at the heart of this article as well.

2. 531 U.S. 1046 (2001).

3. For a defense of the institutional response to the contested election, see, e.g., RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001). For a different perspective, see, e.g., Mark Tushnet, *Renormalizing Bush v. Gore: An Anticipatory Intellectual History*, 90 GEO. L.J. 113 (2001). *See also* George L. Priest, *Reanalyzing* Bush v. Gore: *Democratic Accountability and Judicial Overreaching*, 72 U. COLO. L. REV. 953 (2001); Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law:* Bush v. Gore *and the Emerging Jurisprudence of Oprah!*, 90 GEO. L.J. 2087, 2087 n.3 (2002) (citing to much of the emerging literature).

republic can be transformed through constant small attacks, each formally invoking republican process, yet each distorting that process in the service of factional or personal advantage. Taken together, these successive manipulations at the margin, these uses of precedent or tradition in exaggerated form and extreme ends, eventually reconstruct any republic into something quite unlike itself.

Ronald J. Krotoszynski, Jr. recently described the emerging conventional consensus on the *Bush* decisions:

> A conventional understanding of the *Bush v. Gore* case goes something like this: The evil Supreme Court majority, bent on securing conservative appointees to the federal judiciary, engaged in blatant results-oriented reasoning to rule in favor of Governor Bush. Along the way, members of the evil majority abandoned all prior principles regarding respect for state courts and judicial restraint. The decision, accordingly, lacks legitimacy.[4]

Krotoszynski rejected this conventional characterization and invoked ancient Athens to provide a classical form for his lament over the passing of stare decisis and the philosophy of judging it represented.[5] I also reject this conventional characterization of the *Bush* decisions, but for very different reasons. An *unconventional* understanding of the *Bush* decisions starts by accepting the legitimacy of the decisions and then seeks the reasons for and consequences of that legitimacy. According to this perspective, the decisions are legitimate because they derive from a legitimating institution. The consequences of that decision then become more interesting and more potentially far reaching – both for the institution and the political system it serves.[6] In the context of the *Bush*

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4. Krotoszynski, *supra* note 3, at 2089. Bruce Ackerman, a well-known academic figure, described the decision as a "constitutional coup." Bruce Ackerman, *Anatomy of a Constitutional Coup*, LONDON REV. OF BOOKS, Feb. 8, 2001, at 3, *available at* http://www.lrb.co.uk/v23/n03/print/acke01_.html.

5. Krotoszynski, *supra* note 3, at 2092-93.

> I would like to invoke a tradition of ancient Athens. In ancient Athens, custom dictated that the death of a hero in battle required a formal funeral oratory, or epitaphios. . . .The metaphor to ancient Athens may seem bizarre. But, although I do not profess to be a modern Pericles, I believe the principle of stare decisis in modern constitutional adjudication, like a fallen hero, merits a decent burial. . . . *Bush v. Gore* was not – and is not – a break with the Supreme Court's modus operandi, but rather constitutes a foreseeable consequence of problematic trends that have been present for several decades.

Id.

6. I start therefore from a substantially different place than much conventional analysis, which tends to weigh the legitimacy and the importance of the *Bush* decisions in terms of their outcome or their popular support. *See, e.g.*, Michael Klarman, Bush v. Gore

v. Gore decisions, invoking the principles and history of the Roman Republic, rather than the forms of the Athenian democracy, provides a far more useful basis for understanding the *Bush* decisions.

The history of the Roman Republic reminds us that any constitution, even that of a venerable republic, can be transformed without the benefit of an amendment. Such a transformation may so reshape a republic that it begins to function as a monarchy in everything but name. But the political transformation of a polity can be masked. The most easily fashioned mask consists of the forms of the superceded political systems. Totalitarian dictatorships can masquerade as democracies by maintaining democratic institutions, such as legislatures and judiciaries, which are under the control of the ruling group. The early Roman Empire retained the institutional forms of the Republic even as power was transferred to the imperial household.[7]

Republican Rome also serves as an example of the limited utility of invocation of tradition. The Roman Republic was organized as a class-and-clan-based representative polity in which the forms of political organization were grounded in a tradition that permitted flexibility.

> The Romans venerated tradition, but it was always evolving; it could actually be contended that change was characteristic of it. When Pompey's opponents in 66 argued that the conferment of a great command on him would be an innovation contrary to ancestral practices, Cicero could reply that it was traditional to adopt new expedient as to meet new emergencies. Hence what was constitutional could be a matter of great controversy. The most recent practice could be challenged by resurrecting ancient precedents, and vice versa. This kind of uncertainty no doubt made it easier for Augustus to represent his own innovations as a modification rather the subversion of the old order.
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> The system was, moreover, finely balanced: the rights of people, magistrates, and senate, if pressed to the utmost, would lead to

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Through the Lens of Constitutional History, 89 CAL. L. REV. 1721 (2001). The importance of the case is not necessarily a function of its popularity or its value as doctrine specifically applicable to elections. Instead, its value, like many of the race cases of the 1960s and 70s, derives from the jurisprudential tools it sharpens for use by later courts in very different settings. *See infra* Part V.

7. ALAN WATSON, INTERNATIONAL LAW IN ARCHAIC ROME: WAR AND RELIGION 54 (1993). "Human beings tend not to be overly inventive: ideas and procedures that have outlived their setting in life continue in being. . . . The system might be unsuitable and subject to great strain, might eventually even break down, without disappearing altogether." *Id.*

> breakdown; and the balance depended on some degree of social harmony, which was dissipated in the late Republic.[8]

The Roman Republic illustrates a pattern that has been experienced by other republics in danger of internal breakdown.[9] The American Republic, like its Roman predecessor, presents a finely balanced system.[10] Each of the major actors in this system, including the people, the nation, and the component parts thereof – governmental and non-governmental groups – seeks to gain advantages at the expense of the others in the context of their limited and overlapping authority. Like the late Roman Republic, the American Republic has seen a dissipation of social harmony.[11]

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8. P.A. BRUNT, THE FALL OF THE ROMAN REPUBLIC 13 (1988).

9. *See, e.g.*, Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 HASTINGS L.J. 1 (1998).

10. *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996). The checks and balances with which we are familiar extend beyond the interior organization of the federal government. It extends to almost every aspect of our social and political organization. *See generally* SUSAN DUNN, SISTER REVOLUTIONS: FRENCH LIGHTNING, AMERICAN LIGHT (2000) (discussing the basis of the construction and the mechanics of our republic in comparative perspective). There was general consensus during the period of the early republic about the utility of this form of political organization. This consensus was based on a fundamental distrust of the motives of individuals or groups. For example, the famous excerpt from Madison's Federalist No. 51 states:

> It is of great importance in a Republic not only to guard the society against the oppression of its rulers, but to guard one part of society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil; the one by creating a will in the community itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not *impracticable.*

THE FEDERALIST NO. 51, at 319 (James Madison) (Isaac Kramnick ed., 1987). This finds its echo in the work of John C. Calhoun. *See, e.g.*, John C. Calhoun, *A Disquisition on Government, in* JOHN C. CALHOUN, UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 7-12 (Ross M. Lence ed., 1992). For Calhoun, a "*constitution* stands to *government*, as *government* stands to *society*; and as the end for which society is ordained, would be defeated without government, so that for which government is ordained would . . . be defeated without constitution." *Id.* at 9. A good constitution "will furnish the ruled with the means of resisting successfully this tendency on the part of the rulers to oppression and abuse." *Id.* at 12. "Power can only be resisted by power -- and tendency by tendency. . . . The same constitution of our nature which leads rulers to oppress the ruled . . . will, with equal strength, lead the ruled to resist, when possessed of the means of making peaceable and effective resistance." *Id.* at 13.

11. Even a cursory review of the legal literature on this topic brings this point home. *See, e.g.*, GEORGE GILDER, MEN AND MARRIAGE (1992); CHARLES MURRAY AND RICHARD HERRENSTEIN, THE BELL CURVE (1994); REPUBLICAN NATIONAL COMMITTEE, CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH,

The recent litigation of the 2000 Presidential election, which arose from the disputed result of votes cast in the state of Florida, represents one of the most significant uses of traditional forms of governance in exaggerated form and for extreme ends. In particular, the decisions of the Florida Supreme Court concerning the counting and certification of the votes cast in the Presidential election[12] and the remand, stay, and review of those decisions by the United States Supreme Court merit special attention. These decisions, especially those of the U.S. Supreme Court, pandered to the formally innocuous but substantially subversive positions of the litigants and laid the foundation for significant distorting of the foundations of the Republic.

This article has two goals. The first is to describe the ways in which this litigation, primarily the opinions of the federal Supreme Court in *Bush v. Gore*,[13] stretches and bends the foundational norms of the Republic. The second is to suggest the ways in which the litigation might contribute to fundamental changes in the operation of the Republic in many circumstances far removed from the ostensibly narrow context in which the original litigation arose. These effects are not limited to the facts of this case, and its teachings involve more than federal election law.[14] Indeed, the institutional effects of this decision build on and

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REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION (1994); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 19-49 (1990); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); DOUGLAS S. MASSEY AND NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

12. Gore v. Harris, 772 So. 2d 1243 (Fla. 2000), *cert. granted and stay granted* Bush v. Gore, 531 U.S. 1046 (2000) *and rev'd* Bush v. Gore, 531 U.S. 98 (2000)(*Bush II*); Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. 2000) *vacated by* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000)(*Bush I*) *opinion on remand* Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000). *Bush II* is particularly interesting because, though it is written in the form of a per curium opinion, with a concurrence and a number of dissents, it is clear that the per curium opinion was designed as political window dressing – the bland face of a neutral court understating its opinion. The real battle lines are illuminated in both the concurrence and the dissents, with the latter treating the concurrence as a majority opinion.

13. Bush v. Gore, 531 U.S. 70, 98 (2000). My focus will not be on the specifics of election law, its weaknesses, or its need for reform. Moreover, my focus is not on the nature of the outcome of the election itself. This article is not about election stealing either by Mr. Gore or Mr. Bush. It is not about the denial of the ballot to certain groups of people because of their race, religion, or anticipated political leanings.

14. *See infra* Part IV.

consolidate institutional adjustments that occurred in this country during the course of the great race battles of the twentieth century.[15]

The stretching and bending takes these forms. Each opinion seems innocuous, harking formally to past precedent. Yet, the substance of each opinion contains the possibility of substantial innovation. First, the new-found emphasis on interpretation, as opposed to legislation regarding the judicial approach to dispute resolution substantially limits the ways that courts have wielded power. Second, the expansive view of the federal judicial power to intervene has cleared the path for drastic alteration of the distribution of power between state and federal courts.[16] Third, the use of the federal Constitution as a direct limitation on the distribution of power within state government turns the constitutional system on its head, effectively presuming that states have no power other than that found within the federal Constitution.[17]

These three broad forms of norm elasticity suggest the possibility of major changes. First, the litigation takes an indirect step toward subtly repudiating the judicial philosophy of *Marbury v. Madison*.[18] By suggesting that there are valid (interpretation) and invalid (law-making) forms of judicial review of legislation, the federal Supreme Court has provided a principled basis for repudiating the understanding that it is for the courts to say what the law is. When courts "go too far," *Bush v. Gore* provides justification for another branch to confine the court to its judicial province. *Bush v. Gore* thus limits the form of judicial constitutional review. By the same token, *Bush v. Gore* also provides a principled basis for limiting the power of courts to craft new forms of remedies. In essence, the decision provides the basis for a doctrine of legislative supremacy unknown in the Republic since its earliest days.

Second, the case serves as evidence of the further consolidation of the federal and state systems. After *Bush v. Gore*, it is possible to see a future where state supreme courts will constitute another system of appellate courts with "special" jurisdiction. *Bush v. Gore* suggests that all issues may contain within federal questions, if only negatively. Like

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15. *See infra* Part V.

16. It seems that, even within their own competence, state courts remain inferior to the Supreme Court in ways that have become clearer after *Bush II*. In many respects, this mimics the attempt by the European Court of Justice to expand the extent of its own authority over matters indirectly touching on those matters at the heart of its competence. *See, e.g.*, Case C-107/94, Asscher v. Staatssecretaris van Financian, 1996 E.C.R. I-3089, [1996] 3 C.M.L.R. 61 (1996), and discussion *infra* note 72.

17. In this, perhaps, we reap in full measure the possibilities inherent in the post-Civil War Amendments to the federal Constitution.

18. 5 U.S. (1 Cranch) 137 (1803).

the doctrine of the negative Commerce Clause, the new doctrine of negative federal questions significantly enlarges federal power at the expense of the states.

Third, the decision furthers the transformation of American federalism. No longer a system in which governmental power rises up through the states, American federalism has become a system where governmental power is vested in states only at the sufferance of the national government and particularly its courts.

> Here is a stark manifestation of the principle of supremacy. Hierarchy, in this sense, amounts to hegemony. Indeed, one of the greatest fruits of the American Civil War was the establishment of a hegemonic notion of supremacy in the general government. . . . It is within the institutions of federal government that the scope of devolution to the states, or comity, is most effectively debated and decided.[19]

The stage continues to be prepared for political transformation. Though little has happened in the short time since the decision, the possibilities for structural change within the Republic, which were created by the Warren Court's race decisions, continue to be refined by the Rehnquist Court. Because the outward form of the Republic appears none the worse for wear, the media and intellectual elites congratulate themselves and the polity on a job well done. Many share the view that the Republic has emerged intact, unchanged, and even stronger from this near brush with crisis.[20] The current crop of fungible combatants embrace, and discussion thereafter appears limited to electoral effects.[21]

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19. Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173, 181 n.33 (2001).

20. For example, a nationally broadcast program included a law professor who asserted that "a constitutional crisis would be a question where no one knew who was president. And we have every scenario in theory being worked out." *One on One with John McLaughlin* including guests: William Lash, Professor, George Mason Law School and Christine Kellett, Professor, Pennsylvania State University, Dickinson School of Law, Subject: Florida Presidential Vote Count, Taped: Friday, December 1, 2000 (television broadcast, Dec. 2-3, 2000), transcript available on LEXIS/NEXIS, News Lib (William Lash, Professor, George Mason Law School speaking). *But see* John Podhoretz, *The Mess Al Left; Republicans Should Not Rejoice in This Victory*, N.Y. POST, Dec. 13, 2000, at 55.

> If [Gore] wants to see his monument, he need only look around. Gore leaves in his wake a prospectively crippled presidency, a judiciary in Florida and in Washington tainted by a too-close involvement in electoral politics, a nation already contemptuous of politics now sure to be even more so, and untold tens of millions of Americans in both parties consumed with a blind rage at what they see to be the thieving tactics of the other side.

Id.

21. For example:

But the intact shell of the Republic masks progress in the consolidation of significant changes to the national political character.[22] I harbor no illusions that this turning will be reversed. The political tide favors eventual expansion of the doctrines, the seeds of which find more generalized expression now. Indeed, I suspect that many welcome the "clarifications" brought about by the recent litigation. The possibilities for stability and advantage are hard to resist. In any case, this litigation both solidifies the facade and brings the nation closer to realizing the fundamental changes occurring underneath the surface of our political organization.[23]

> President-elect George W. Bush wrapped up his two-day goodwill mission to Washington on Tuesday, meeting with President Clinton and Vice President Al Gore, the man he defeated in a bitter prolonged battle for the White House. In their first appearance together since the final presidential debate in St. Louis on Oct. 17, Democrat Gore greeted the Republican president-elect outside the vice-president's residence at the U.S. Naval Observatory. They shook hands and posed for pictures. Gore gave Bush a pat on the back.

Larry Bivins, *Bush Meets Clinton, Gore as Washington Visit Winds Down*, CHI. SUN-TIMES, Dec. 20, 2000, at 1.

22. As one historian of Roman history has noted:

> Historians have seen the battle of Actium as a watershed – the end of the republic and the beginning of the *principate*. It is doubtful whether most Romans would have been aware of this great milestone, as Octavian, his faction and patronage represented massive demonstration of continuity. Because of this, it was easy for such slogans as the restored republic (*respublica restituta*) to slip into the political vocabulary.

DAVID SHOTTER, THE FALL OF THE ROMAN REPUBLIC 96 (1994). Americans have also adopted the habit of looking for singular great events to mark great transformations. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE (1991).

23. Of course, this is neither the first nor the last great transformation of the Republic. The nineteenth century saw a half-century-long struggle to change the internal political organization of the American Republic, starting with the Civil War and culminating in the adoption of progressive era constitutional amendments immediately prior to the start of the First World War. "An amendment of the Constitution in 1913 [Seventeenth Amendment] completed the process formally by making the election of senators a matter for the people of the states, not for the legislatures. . . ." K. C. WHEARE, FEDERAL GOVERNMENT 3 (1947). Moreover, Wheare, like others, have noted that "in the United States three amendments XIV, XVI and XVII increased the powers of the general government." *Id.* at 237. These changes saw their mature expression during the half century between the start of the Great Depression and the election of Ronald Reagan to the American Presidency. The seeds of the next great changes to the internal governance of our Republic may well have originated with opposition to the Franklin Roosevelt administration and may have found their first great public expression during the presidency of Ronald Reagan. For an interesting contemporary account by one of the architects of the Reagan Presidency, see Jeane J. Kirkpatrick, *The Reagan Phenomenon and the Liberal Tradition*, *in* JEANE J. KIRKPATRICK, THE REAGAN PHENOMENON AND OTHER SPEECHES ON FOREIGN POLICY 3 (1983). Kirkpatrick comments:

> More than once it has occurred to me that the elections of 1980 in the United States bear a certain resemblance to those of 1958 in France. . . . Why? Because

I. THE NEW SUBSTANTIVE DIVIDE BETWEEN JUDICIAL INTERPRETATION AND LEGISLATION BY JUDICIAL DECISION

Americans have rejected parliamentary sovereignty since colonial times.[24] Yet the scope of judicial review has been controversial from the

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> the Gaullist epoch marked a resurgence of French identity and French self-confidence after a period of national doubt and denigration; second, because it marked a significant departure from the period just past; and third, because the new period of national unity and identity affected both the content and the style of French foreign and domestic policy, as the new American consensus is likely to affect both the content and style of American foreign and domestic policy.

Id. at 12.

In outward form, this new direction appears reactionary and theocratic. *See, e.g.*, George W. Bush, Inauguration Speech, January 20, 2000, *available at* http://www.whitehouse.gov/news/print/inaugural-address.html. In actuality, however, the new movement for fundamental change may be neither. Instead, it may be class-based, hierarchical, feudal, and corporate in outlook. For an early opinion, see A. JAMES REICHLEY, CONSERVATIVES IN AN AGE OF CHANGE: THE NIXON AND FORD ADMINISTRATIONS (1981). For a later statement in the form of legislative agendas, see CONTRACT WITH AMERICA, *supra* note 11. For a hopeful and idealized vision of the future, see MICHAEL LIND, THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION (1995) (emphasizing ethno-culturalism with a sweet coating of class justice). The movement has found support in political parties and business factions within the Republic. Thus, there has been recent universal emphasis on behavior, wealth, and position. This emphasis was dramatically enacted into legislation and served as the new basis for the provision of federal aid for relief of the poor in 1996. *See, e.g.*, MICHAEL KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE (1989); JOEL F. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA (1991). It also accounts for the partial devolution of formal power from the center to the periphery in a system in which the center retains the power of the purse and the authority to speak for the entire community to outsiders. For example, even those most in favor of state power have been careful to retain power over disbursement of revenues at the national level, assuring fundamental control at the center. For an example, examine the way in which the programs to aid the poor were modified in 1996; the states were granted substantial control, but funds and overall direction remained firmly in the control of the national authority. *See, e.g.*, Larry Catá Backer, *Welfare Reform at the Limit: An Essay on the Futility of "Ending Welfare as We Know It,"* 30 HARV. C.R.-C.L. L. REV. 339 (1995).

The fact that great transformations happen over a long period of time in the formal and normative organization of the Republic is not a new insight. For a different perspective, one based on a more traditional "great moments in history" or "big bang" concept of change, see BRUCE ACKERMAN, WE THE PEOPLE (1991) (offering a grand view of constitutional law as based on a series of constitutional moments) and, Michael McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENTARY 115 (1994) (suggesting an additional constitutional moment -- Reconstruction and the creation of formal apartheid in the United States). For a critique of this view of constitutional history, see Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2002 (1999). Academics tend to focus less on the current manifestations of the repetition of normative patterns. Perhaps each generation tends to treat history as ending with it.

24. *See, e.g.*, David Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646 (1982). On John Marshall's views, see

start of the Republic. Section 25 of the Judiciary Act of 1789[25] and *Marbury v. Madison*[26] appear to authorize judicial review of state and federal action outside the actor's scope of authority. Yet this authorization was bitterly contested throughout the history of the early Republic. More vocal critics included intellectuals who provided the normative basis of the Confederate States of America,[27] as well as some of our most revered founders, Madison and Jefferson.[28] The nation was significantly divided on whether the federal government, and especially its judicial branch, had the supreme authority to determine the scope of its own powers and the powers of the member states of the Union. That debate was settled by war and by the constitutional revolution of the second half of the 19th century, from which arose the modern American Republic.[29]

Samuel R. Olken, *Chief Justice John Marshall and the Course of American Constitutional History*, 33 J. MARSHALL L. REV. 743, 760-63 (2000).

25. 1 Stat. 73 (1789).

26. 5 U.S. (1 Cranch) 137 (1803). A dated but valuable study of the details of this case can be found in William Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1.

27. Among the most enduring of these is John C. Calhoun. *See A Discourse on the Constitution and Government of the United States* 78, 171, 186-87, 224-28, *in* JOHN C. CALHOUN, UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 3 (Ross M. Lence ed., 1992) (1850).

28. Jefferson never reconciled himself to the decision in *Marbury*, and he remained a bitter political opponent of its author.

> I see, as you do, and with the deepest affliction, the rapid strides with which the federal branch of our government is advancing towards the usurpation of all the rights reserved to the States, and the consolidation in itself of all powers, foreign and domestic; and that, too, by constructions which, if legitimate, leave no limits to their power. Take together the decisions of the federal court, the doctrines of the President, and the misconstructions of the constitutional compact acted on by the legislature of the federal branch, and it is but too evident, that the three ruling branches of that department are in combination to strip their colleagues, the State authorities, of the powers reserved by them, and to exercise themselves all functions foreign and domestic.

Letter from Thomas Jefferson to William Giles, December 26, 1825, *in* JESSE T. CARPENTER, THE SOUTH AS A CONSCIOUS MINORITY, 1789-1861: A STUDY IN POLITICAL THOUGHT 75-76 (1930).

29. *See, e.g.*, K. C. WHEARE, *supra* note 23, at 3-8.

> A long controversy, which was not finally closed until after the Civil War of 1861-5, continued between those who regarded the general government as the agent of the states and those who maintained that it was or ought to be an independent government. Indeed, it took 'the terrible exercise of prolonged war,' in Woodrow Wilson's phrase, to resolve the conflict between the two principles.

Id. at 9 (footnotes omitted).

Since 1865, the reconstituted American Republic, which had become a nation rather than a union of states, enforced the long-held consensus that judicial review was limited only by the self-control of judges[30] when voiding statutes,[31] construing statutes to avoid defect,[32] or mediating between conflicting assertions of power between the institutions of federal and state government.[33] The power of courts to fashion remedies was broadly created as well,[34]—crafting remedies when necessary.[35]

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30. *See, e.g.*, SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990). On the unsettled consensus over the extent of judicial review permitted under the federal constitution, see CHARLES G. HAINS, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 88-285 (1959). *See generally* EDWARD S. CORWIN, COURT *OVER* CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT (1938); LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY (1938); CHARLES A. BEARD, THE SUPREME COURT AND THE CONSTITUTION (1912). *But see* RAOUL BERGER, CONGRESS V. THE SUPREME COURT (1969).

31. The power to void statutes is almost as old as the Constitution and is significantly more controversial. For example, the "void for vagueness" doctrine has been used effectively in constitutional jurisprudence, sometimes successfully, sometimes not. For a discussion of the use of the doctrine in the context of the regulation of sexual conduct over the course of the twentieth century, *see* Larry Catá Backer, *Raping Sodomy and Sodomizing Rape: A Morality Tale About the Transformation of Modern Sodomy Jurisprudence*, 21 AM. J. CRIM. L. 37 (1993). *Bush II* provides a different context for voiding statutes. Here, the Supreme Court voids not a legislative act of a legislature but an interpretive act of a court on the basis of its characterization as "legislation."

32. Familiar canons of construction developed and occasionally applied by the courts, remind the bar of the power of the court to "remake" law to avoid constitutional problems. Among them is the canon that ambiguous statutes are to be construed to avoid constitutional defect. Of course, after *Bush II*, one can wonder whether, or to what extent, these canons retain any viability. It is possible, for example, to argue that any construction for the purpose of avoiding constitutional infirmity amounts to lawmaking. It vests the courts with the power to make a legislative determination of the basic construction of the statute -- an act at the core of the legislative function.

33. *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997) (rejecting the right of the federal government to compel states to administer a federal legislative program); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (prohibiting states from adding qualifications to congressional representatives serving the people of that state); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952) (limiting presidential power to legislate); INS v. Chadha, 462 U.S. 919, 923 (1983) (invalidating congressional veto power of certain administrative acts); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 52 (1982) (invalidating an act empowering Article I bankruptcy judges to have authority over Article II cases or controversies).

34. "[I]t is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Bell v. Hood, 327 U.S. 678, 684 (1946). The jurisdictional grant of authority under Article III of the Constitution has been interpreted to provide "not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution, but also the authority to choose among available judicial remedies in order to vindicate constitutional rights." Bush v. Lucas, 462 U.S. 367, 374 (1983).

Yet now, the Supreme Court has articulated a clear distinction between the scope of judicial review of legislative acts and other judicial actions. *Bush v. Gore* appears to create a significantly more narrow approach to statutory interpretation by the judiciary. The Supreme Court significantly expands the legal effect of distinguishing between judicial construction of statutes, which can be characterized as "interpretation," and construction, of new legal rules, which can be characterized as "law-making." What is now called *interpretation* constitutes the only form of permissible judicial review. What is now called *law-making* is deemed to be beyond the powers of a common law court, even a court of last resort.[36] It is for the federal Supreme Court to determine the difference between these forms of interpretation.

The Supreme Court reaches this result indirectly. In *Bush I*, the concept of interpretive *ultra vires* can be seen in the shadows. It is known only in its effects. The principle is constructed out of federal law relating to congressional power to ascertain a state's presidential electors.[37] It slips in, almost unnoticed:

> Since § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state

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35. Indeed, one of the most ironic aspects of *Marbury* was Justice Marshall's construction of Section 13 of the Judiciary Act of 1789 creating a remedy of original jurisdiction in the Supreme Court to issue mandamus against federal officials, where none appeared to exist in the plain language of the statute. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). For a modern example of the extent of the remedial powers of the Supreme Court, see Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15-16 (1971) (establishing extensive school busing based on race percentages for remedying unconstitutional race segregation in schools).

36. As a technical matter for the moment it is more precise to say that this limitation is true at least in certain circumstances. The U.S. Supreme Court speaks only to the peculiar actions of the Florida Supreme Court construing a statute under the singular circumstances of a contested American presidential election. But doctrine has a nasty habit of jumping the borders of the precise factual context in which it arises, however singular. Indeed, the Supreme Court itself demonstrated this jumping power of jurisprudential ideas in two decisions issued at the close of the last term - Boy Scouts of America v. Dale, 530 U.S. 640 (2000), and Board of Regents of the University of Wisconsin System v. Southworth, 529 U.S. 217 (2000). In *Southworth*, a majority of the Supreme Court determined that the fee program created a public forum by close analogy. 529 U.S. at 241. "In *Boy Scouts of America*, the majority stretches to make new constitutional doctrine by the process of analogy. This time, the object was to stretch the relevance and utility of Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc., [515 U.S. 557 (1995)] the way the majority in *Southworth* stretched the public forum doctrine to accommodate the facts as they found them in that case." Larry Catá Backer, *Disciplining Judicial Interpretation of Fundamental Rights: First Amendment Decadence in* Southworth *and* Boy Scouts of America *and European Alternatives,* 36 TULSA L.J. 117, 136 (2000).

37. 3 U.S.C. § 5 (2000).

> law in effect before the election, a legislative wish to take advantage of the "safe harbor" would counsel against any construction of the Election Code that Congress might deem to be a change in the law.[38]

The thrust of this thought is plain enough. Florida courts are free to interpret Florida law but not if that interpretation could, in turn, be interpreted by the national legislative body as a change in the state law as construed by the courts.[39] The Florida courts appear to have no authority over this legislative determination of the character of their judicial decisions.[40] Without fanfare, it now appears settled that the national legislature can, by statute, limit the jurisdiction of state courts over state law questions. Moreover, a new distinction can now be made between judicial decisions construing statutes. Judicial decisions labeled "interpretation," that is, judicial decisions that would not, in the opinion of the legislature change the law, continue to enjoy the traditional authority of judicial decisions.[41] However, a new species of judicial interpretation, labeled "legislation," has been identified. This species of interpretation is now beyond the authority of the courts. It is an interpretation that effects a *change* in the law.

It is hard to imagine so much from so little in *Bush I*. However, the implications of that sentence, the intent of the authors of that innocuous thought, was revealed well enough in the many opinions produced in

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38. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000).

39. *See id.*

40. *See id.* Here is Chief Justice Marshall's principle of judicial deference to legislative constitutional findings in *McCulloch v. Maryland* turned on its head:

> But it is conceived, that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of government, ought to receive a considerable impression from that practice.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819). It is now the legislative body which must determine the amount of deference due judicial interpretation where doubtful questions of constitutional interpretation are presented.

41. As the dissents in *Bush II* remind us, decisions that can still be characterized as "interpretation" continue to enjoy traditional protection. Such decisions do not produce interpretations "unreasonable to the point of displacing the legislative enactment. . . ." *See* Bush v. Gore, 531 U.S. 98, 131 (2001) (Souter, J., dissenting). Justice Souter explained that the "majority view is in each instance within the bounds of reasonable interpretation, and the law as declared is consistent with Article II." *Id. See also id. at* 136 (Ginsburg, J., dissenting).

Bush II, rather than in the per curiam opinion itself.[42] "The Chief Justice maintains that Florida's Supreme Court has veered so far from the ordinary practice of judicial review that what it did cannot properly be called judging."[43] The Chief Justice suggests that the Florida Supreme Court's decision, as interpreted in turn by the U.S. Supreme Court, "infringed upon the legislature's authority"[44] and amounted to law making of the worst sort by "step[ping] away from this established practice, prescribed by the Secretary, the state official charged by the legislature with 'responsibility to . . . [o]btain and maintain uniformity in the application, operation, and interpretation of the election laws,' . . . [thus] depart[ing] from the legislative scheme"[45] and "from the statutory framework in place on November 7."[46]

The new limitation on the interpretive power of the courts is announced in a manner in which its existence can be plausibly denied. Invoked as nothing more than the routine application of venerable doctrine, it operates under this cover to produce a new and significant doctrine for the limitation of the power of courts to interpret statutes. Indeed, the Chief Justice goes to some lengths, in an off-handed way, to suggest that there is nothing novel about the conclusions of the Court in *Bush II*. He cites a number of cases to prove the point that "[t]hough we generally defer to state courts on the interpretation of state law there are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law."[47]

The doctrine of impermissible interpretation comes in two parts. The first is that state courts exceed their interpretive authority when their

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42. The necessities of coalition building for purposes of cobbling together an agreement among a majority of the members of the Supreme Court produced a per curiam opinion in *Bush II* that carefully avoided the issue.

> The petition presents the following questions: whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2, of the United States Constitution and failing to comply with 3 U.S.C. § 5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses. With respect to the equal protection question, we find a violation of the Equal Protection Clause.

Id. at 103.

43. *Id.* at 135-36 (Ginsburg, J., dissenting).

44. *Id.* at 120 (Rehnquist, C.J., concurring).

45. *Id.*

46. *Id.* at 122. The Florida Supreme Court decision also failed for authorizing open-ended proceedings that would extend beyond a deadline set by the Chief Justice. *Id.*

47. *Id.* at 114. The Chief Justice then cites two cases from the height of the segregation wars, in which the federal Supreme Court struck down state high court action. The cases he cites are: NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) and Bouie v. City of Columbia, 378 U.S. 347 (1964). *Id.* at 114-15.

interpretation amounts to an arbitrary exercise in legislation. The second is that, under those circumstances, the Supreme Court has the authority to void such non-judicial action.

The doctrine of impermissible interpretation is built on the sort of precious hyper-legal analysis that has come to characterize the jurisprudence of the Supreme Court at its most devious.[48] This smoke and mirrors analysis of the Chief Justice does not go unnoticed. Justice Ginsburg does a credible job of exposing the Chief Justice's construction of the interpretation and legislation doctrine from a tangentially relevant judicial history in which the Supreme Court sought to enforce its power against the defiance of state high courts.[49] Justice Ginsburg observes that the cases cited by the Chief Justice were extraordinary in the sense that each representes an act which was part of a greater and deliberate attempt to thwart a greater federal policy, law, or treaty. *Fairfax's Devisee* involved the implementation of a federal treaty while *Patterson* and *Bouie* represented instances in which state supreme courts were participating in a concerted attempt to thwart the implementation of federal race policy. Thus, the three cases involved actual and clear attempts to block federal policy or law indirectly. The decision of the Florida Supreme Court, on the other hand, represented a completely

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48. This sort of decadent jurisprudence has recently been discussed, especially in the First Amendment area:

> Two decisions of the Supreme Court, issued at the close of the 2000 term - *Boy Scouts of America v. Dale,* and *Board of Regents of the University of Wisconsin System v. Southworth* - provide a stunning illustration of the decadent and baroque qualities of constitutional adjudication that is slowly sapping the vigor of juridical authority to interpret our "Basic Law." Each is an expression of the overripe over-conceptualization of the interstices of constitutional law. Protection of the right of "expression" and of "association" lie buried under multiple layers of doctrine now critical to the core expression of the "right," but only related to that core expression by six degrees of separation. Expression and association become lost in "expressive association," "public accommodation," "public forum" and other subsidiary standards, tests and doctrines. Doctrine, and its twists and turns - the periphery - become the core about which the central right is focused.

Larry Catá Backer, *Disciplining Judicial Interpretation of Fundamental Rights: First Amendment Decadence in* Southworth *and* Boy Scouts of America *And European Alternatives*, 36 TULSA L.J. 117, 121-22 (2000).

49. Justice Ginsburg argued: "The Chief Justice's casual citation of these cases might lead one to believe they are part of a larger collection of cases in which we said that the Constitution impelled us to train a skeptical eye on a state court's portrayal of state law. But one would be hard pressed, I think, to find additional cases that fit the mold." *Bush II*, 531 U.S. at 140 (Ginsburg, J., dissenting).

different context. As such, those cases were inapplicable to *Bush II*.[50] Indeed, as Justice Stevens stated, the only way *Patterson*, *Fairfax's Devisee,* and *Bouie* could be relevant are as "an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed."[51] Justice Breyer honed in on the Chief Justice's "unusual review of state law in this case" to concentrate on disproving that the Florida Supreme Court impermissibly distorted Florida statute.[52]

The hyper-legality of modern Supreme Court jurisprudence not only makes the Chief Justice's arguments possible, it makes them plausible. Even if inapplicable in *Bush II*, as some of the Justices suggested, the interpretation and legislation doctrine, now restated and broadened, will be available for application to cases in which it otherwise would have been extraordinary for the Supreme Court to intervene. Indeed, even the Justices who disagreed with the doctrine's application against the Florida Supreme Court do not necessarily reject the newly articulated limitation on the authority of courts. Consider the approach of the dissenting Justices on this point. Justice Ginsburg explained that she:

> might join the Chief Justice were it [her] commission to interpret Florida law. But disagreement with the Florida court's interpretation of its own State's law does not warrant the conclusion that the justices of that court have legislated. There is no cause here to believe that the members of Florida's high court have done less than "their mortal best to discharge their oath of office," and no cause to upset their reasoned interpretation of Florida law.[53]

Justice Breyer also accepts the proposition that judicial construction of statutes has its limits. For Justice Breyer, a court can interpret any statute in so "misguided" a way "as no longer to qualify as judicial interpretation or as [to constitute] a usurpation of the authority of the state legislature."[54] His only disagreement with the Chief Justice on this score lies in his conclusion that the Florida courts did not "legislate."[55] Justice Souter also accepts the proposition of the Bush lawyers that interpretation can so "transcend the accepted bounds of statutory

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50. *Id.* at 140-41 (Ginsburg, J., dissenting). The Florida Supreme Court "surely should not be bracketed with state high courts of the Jim Crow South." *Id.* at 141.

51. *Id.* at 128 (Stevens, J., dissenting).

52. *Id.* at 147 (Breyer, J., dissenting).

53. *Id.* at 136 (Ginsburg, J., dissenting) (citing Sumner v. Mata, 449 U.S. 539, 549 (1981)).

54. *Id.* at 152 (Breyer, J., dissenting).

55. *Id.*

interpretation, to the point of being a nonjudicial act and producing new law, untethered to the legislative Act in question."[56] Even Justice Stevens does not contest the proposition, implicit in his arguments, that courts may "change" statutory law in the course of interpretation, and that this may amount to impermissible lawmaking. Justice Stevens asserts only that "neither in this case, nor in its earlier opinion in [*Bush I*], did the Florida Supreme Court make any substantive change in Florida electoral law."[57]

At first blush, this limitation on the interpretive power of inferior courts seems to favor the Supreme Court. It is, after all, the Supreme Court that has reserved for itself a power to judge the character of other courts' interpretation. Yet, the ultimate beneficiary of the new doctrine is the legislature; thus the doctrine has the potential for great effect. As a general principle of law, it provides a powerful new tool to deny the authority of judicial pronouncements. Any interpretation can be characterized as a change in the law. The effects of almost every interpretive act is to change the understanding of the underlying text. The difference between interpretation and legislation is merely a matter of degree.[58] As such, distinctions of this type can easily result in the

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56. *Id.* at 131 (Souter, J. dissenting) (restating, before refuting, Bush's position). Justice Souter, like Justices Breyer and Ginsburg, devotes much of his opinion to proving that the interpretation of the Florida Supreme Court, while perhaps misguided, was not unreasonable. *See id.* at 138. "Whatever people of good will and good sense may argue about the merits of the Florida court's reading, there is no warrant for saying that it transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the 'legislature' within the meaning of Article II." *Id.* at 133.

57. *Id.* at 127-28 (Stevens, J., dissenting). Justice Stevens, however, clearly rejectes the notion of judicial interpretation as law making of an impermissible kind. In a footnote, Justice Stevens asserts the opinion of the Florida Supreme Court that "[l]ike any other judicial interpretation of a statute, its opinion was an authoritative interpretation of what the statute's relevant provisions have meant since they were enacted." *Id.* at 128 n.6 (Stevens, J., dissenting) (citation omitted).

58. Conceivably, acceptance of this interpretation-to-legislation continuum underlies the reluctance of the dissenting opinions to suggest categorically that interpretation can never fundamentally alter the text interpreted and thereby amount to legislation. Yet, judicial practice from the inception of the current Republic has been based on a tacit acceptance of the idea that there is no break between interpretation and legislation when a court confronts ambiguities in or application of a text. Consider, in this light, whether the construction of section 13 of the Judiciary Act of 1789, did not, in effect, modify the text without the imprimatur of the legislature and thus amount to law making. *See* Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 174-79 (1803). It follows, from the creation of an interpretation-lawmaking divide, that in cases of ambiguity it is not for the courts, but for the legislature, to determine the precise meaning of its acts in order for any court to avoid law making in the guise of judging. As such, it may be that what follows from the reasoning of *Bush II* is that the courts, including the federal Supreme Court, *must* consult the legislative branches in the construction of statutes before they may rule on their

creation of a doctrine of presumption of legislative effect. This presumption can serve as the basis of a rule that treats any judicial interpretation of a statute that can change the result in a given case or under a given set of circumstances as law-making, and thus void. This sort of doctrinal result is nothing new to the Supreme Court. It simply mirrors earlier attempts to distinguish between "substance" and "procedure" after *Erie,*[59] which resulted in interpretive regimes in which virtually any difference between state and federal law was deemed "substantive."[60]

In its most radical iteration, the use of this interpretation/legislation distinction can be applied by Congress to the "interpretative" judgments

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constitutionality in order to avoid law making. If this is not a necessary implication, then it is possible that *Bush II* merely stands for the proposition that constitutional decision making provides no precedential or predictive value. Either view represents a movement away from current mythology of the function of the federal courts and the character and utility of its decisions.

59. Erie R.R. Co. v. Tompkins, 304 U.S. 641, 78-80 (1938) (establishing the rule that in diversity cases before the federal courts, state law is to be applied by the court unless a different result is required under federal constitutional or statutory law).

60. Cases after *Erie* interpreted the command in that case to require a strict interpretation of *Erie,* and tests were structured for that purpose. *See* Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99 (1945).

> And so the question is not whether a statute of limitations is deemed a matter of "procedure" in some sense. The question is . . . does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court? . . . In essence, the intent of [*Erie*] was to ensure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.

Id. at 109.

> The problem was nicely explained by Justice Harlan in his concurrence in *Hanna v. Plummer*, a case that held that the *York* outcome-determinative test cannot be applied mechanically, but must be guided by the goals of discouraging forum shopping and avoiding inequitable administration of laws. *See generally* Hanna v. Plummer, 380 U.S. 460 (1965). Justice Harlan responded, "The Court is quite right in stating that the 'outcome determinative' test of *Guaranty Trust Co. v. York*, if taken literally, proves too much, for any rule, no matter how clearly 'procedural,' can affect the outcome of litigation if it is not obeyed." *Id.* at 475 (Harlan, J., concurring) (citation omitted). The courts continue to struggle with the problem of application of tests of presumptive effect. *See, e.g.*, Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 419 (1996) (applying state law for review of jury awards). The point is that the Supreme Court has turned descriptive boundaries with consequential effect, like those between substance and procedure, into presumptions meant to prevent an erroneous application of federal substance. There is nothing to prevent the Supreme Court from articulating an "outcome determinative" test of sorts for judicial interpretation and lawmaking.

of the Supreme Court to the same extent as the Supreme Court applies it to state high courts interpreting state law. While the Supreme Court may hide behind the Constitution, claiming supra-judicial authority against the Congress, it is hard to distinguish as a matter of logic or constitutional interpretation the difference between the possibility of faulty interpretation by a state high court and the possibility of faulty ineterpretation by the nation's high court. In either case, at least according to the *Bush* distinctions, the courts would be "making" law rather than "saying what the law is." Like the Florida courts, the U.S. Supreme Court's interpretation of statutes or the Constitution, could be so unreasonable that it amounts to a non-judicial act in violation of the Court's authority under Article III of the federal Constitution. The *Bush* cases suggest the principle that the power to make such a determination, like the power to determine what constitutes a change in the law for purposes of 3 U.S.C. § 5, will likely fall to Congress.[61] It is in this sense, perhaps, that the broad mandate carved out by the Court itself two hundred years ago in *Marbury* could be used against itself. Should Congress ever decide that a Supreme Court decision on a point of constitutional law is unreasonable, the Supreme Court has given Congress the legal basis for overturning such interpretation as "a nonjudicial act. . . producing new law untethered to the legislative Act in question."[62] The Supreme Court has now fashioned a jurisprudence in which courts may no longer have the authority to do "what courts do."[63] As Justice Stevens suggests somewhat elliptically in his dissent, this power to say what the law is may now give way to a recognition of the

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61. The Burger Court provides a basis for creating a doctrine of this type. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985) ("But the principal and basic limit on the federal commerce power is that inherent in all congressional action -- the built in restraints that our system provides through state participation in federal governmental action."). This notion of congressional supremacy can be applied, by analogy, to limit the role of the federal courts. Justice Powell understood the potential, as yet unrealized, when he stated in dissent that "[t]his result is inconsistent with the fundamental principles of our constitutional system. At least since *Marbury v. Madison*, it has been the settled province of the federal judiciary 'to say what the law is' with respect to the constitutionality of acts of Congress." *Id.* at 567 (Powell, J., dissenting) (citations omitted).

62. *Bush II*, 531 U.S. at 131 (Souter, J., dissenting).

63. *Id.* at 128 (Stevens, J., dissenting) (citing Marbury v. Madison, 1 Cranch. 137, 177 (1803)) ("It is emphatically the province and duty of the judicial department to say what the law is."). Ironically, the interpretation/legislation distinction can be harmonized with *Marbury*. If the province of the courts is the judicial sphere, then judicial activity that has the effect of amending statutes or the Constitution clearly falls outside that sphere. Such activity, according to the logic of *Marbury*, belongs to the legislature and the people, as ultimate sovereigns.

power of the legislature to take that determination from the courts. That this result is not serendipitous, at least in the minds of some of the younger members of the Court, does not bode well for continued judicial control of the extent of the judiciary's own interpretive powers.[64]

II. FEDERAL JUDICIAL SUPREMACY

The *Bush* cases are bundled in irony and paradox. While the Supreme Court has provided a basis for substantially narrowing the scope of judicial review of statutes, it has also articulated a basis for the consolidation of its own powers over the judiciary, particularly the state judiciary. In a sense, the stage is set for the federalization of state courts under the broadest possible reading of dicta in cases such as: *Martin v. Hunter's Lessee*[65] and *Cohens v. Virginia*.[66] The Chief Justice does not disguise this aim in *Bush II*.[67] He states:

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64. *See, e.g.*, Mistretta v. U.S., 488 U.S. 361, 362 (1989) (dealing with the Sentencing Reform Act of 1984). In his dissent, Justice Scalia somewhat prophetically stated his view:

> The whole theory of *lawful* congressional "delegation" is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine – up to a point – how small or how large that degree shall be.

Id. at 417 (Scalia, J., dissenting).

65. 14 U.S. (1 Wheat.) 304, 328, 380 (1816). *But see* Sheldon v. Sill, 49 U.S. (8 How.) 441, 448 (1850) (explaining that Congress has authority to withhold jurisdiction from inferior courts). Indeed, there exists a cottage industry of academics and other crafting principles and methods of all sorts for this very purpose. Much of it has been fueled by Supreme Court decisions in the twentieth century on separation of religion and sexual mores. *See, e.g.*, EDWARD KEYNES & RANDALL MILLER, THE COURT VS. CONGRESS: PRAYER, BUSING AND ABORTION (1989) (curbing jurisdiction of the federal courts); RAOUL BERGER, CONGRESS V. THE SUPREME COURT (1969) (attacking the principle of federal court power of judicial review of legislative acts and the Constitution).

66. 19 U.S. (6 Wheat.) 264, 447 (1821). The broad nationalist dicta in these cases has been challenged. For a discussion of Congress' power to restrict the jurisdiction of the federal courts, *see* MARTIN REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER (1980).

67. The Chief Justice cited as an example the requirement that the Supreme Court analyze state property law in determining whether property has been taken in violation of the Takings Clause. He explained:

> That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights. In one of our oldest cases, we similarly made an independent evaluation of state law in order to protect federal treaty guarantees.

Bush II, 531 U.S. at 115 n.1 (Rehnquist, C.J., concurring) (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) and Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1812)).

> This inquiry does not imply a disrespect for state *courts* but rather a respect for the constitutionally prescribed role of state *legislatures*. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.[68]

If one is to believe some of our judges, the federal Constitution itself now appears to give the Supreme Court the authority to review the internal governance of states as long as some federal constitutional connection can be made. It also appears that the Constitution devolves power down to the states, at least with respect to matters that are within the province of the federal government. Likewise, it seems probable that the Supreme Court can, assert authority over issues involving state organization or powers. Indeed, that seems to have been the thrust of *Bush I's* understated but clear suggestion that the federal Constitution "took" from the Florida State Constitution the authority to determine the distribution of power between its coordinate branches of government, vesting the state legislature with authority beyond any authority conveyed by the state constitution.[69]

The *Bush* decisions constitute another step in the construction of a new constitutional doctrine: the negative federal question doctrine. Like the doctrine of the negative Commerce Clause, an expanded doctrine of negative federal question significantly enlarges the discretionary power of the Supreme Court to intervene in the affairs of the states.[70] Almost all of the opinions in *Bush II* add weight to the notion that there may be no issue that does not contain within it a federal question, even if only negatively or indirectly. As a consequence, there may be no issue of state law beyond the power of the Supreme Court to judge. Justice Souter's analysis of the lack of interpretive failure in the decision of the Florida Supreme Court is based on the notion that the Florida Supreme Court could have engaged in impermissible interpretation and legislation by

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68. *Id.*

69. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000) (per curium). "Specifically, we are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2." *Id.*

70. *See Bush II*, 531 U.S. at 115 (Rehnquist, C.J., concurring). The Chief Justice comes to this reluctantly, but no less aggressively. Justice Stevens, however, suggests some restraint: "Neither § 5 nor Article II grants federal judges any special authority to substitute their views for those of the state judiciary on matters of state law." *Id.* at 124 (Stevens, J., dissenting).

declaring law different from "the provisions made by the legislature, to which the National Constitution commits responsibility for determining how each State's Presidential electors are chosen."[71] Justice Ginsburg takes a more traditional position, but one which also admits this possibility.[72] Justice Breyer deals with the possibility as a necessity born of the aggressive activism of his more traditionalist colleagues.[73]

The basis for this extension runs parallel to a similar extension of authority articulated by the European Court of Justice.[74] While the federal judiciary is one of limited authority, the primary authority of those courts must include the power to judge whether any action undertaken by any person, under color of either federal or state authority, directly or indirectly touches on the basic normative rules of behavior memorialized in the Constitution. Because all governmental acts may have direct or indirect constitutional effect, the Supreme Court has the authority to review all acts, even those over which it has no direct jurisdiction.

Additional evidence of the federalization of state courts can be seen in the *Bush* cases' use of due process and equal protection principles. In *Bush I* and *Bush II*, due process and equal protection are emphasized as the bases for the construction of general federal constitutional principles

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71. *Id.* at 130 (Souter, J., dissenting).

72. *Id.* at 142 n.2 (Ginsburg, J., dissenting). Justice Ginsburg states: "Even in the rare case in which a State's 'manner' of making and construing laws might implicate a structural constraint, Congress, not this Court, is likely the proper governmental entity to enforce that constraint." *Id.*

73. *Id.* at 147-48. Though asserting that the case raised no substantial federal question, Justice Breyer was constrained to devote pages of analysis to the possibility and the refutation of arguments for the rejection of the opinion of the Florida Supreme Court on those grounds. He says, "[M]oreover, even were such review proper, the conclusion that the Florida Supreme Court's decision contravenes federal law is untenable." *Id.*

74. Case C-107/94, Asscher v. Staatssecretaris van Financian, 1996 E.C.R. I-3089, [1996] 3 C.M.L.R. 61 (1996). In this case, the European Court of Justice opined that though direct taxation fell within the competence of the Member States of the European Union and not the Union itself, the European Court of Justice nonetheless had authority to review Member State enactment of tax statutes falling outside the authority of the European Union to determine whether the Member State's exercise of its competence was consistent with the constitutional order of the European Union. *Id.* at XX. In that case, specifically, the European Court of Justice reviewed Member State tax statutes to determine whether the statutes at issue caused any overt or covert discrimination on grounds of nationality, which is prohibited under the treaties establishing the European Union. For a discussion of the jurisprudence of the European Court of Justice, see MIGUEL POIARES MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION (1998); THE EUROPEAN COURTS AND NATIONAL COURTS – DOCTRINE AND JURISPRUDENCE (Anne-Marie Slaughter et al. eds., 1998); TREVOR C. HARTLEY, CONSTITUTIONAL PROBLEMS OF THE EUROPEAN UNION (1999).

of law, which are applicable to all actions and which vest the Supreme Court with the authority to review all governmental action for fairness.[75] More importantly, these principles now provide a basis for the disciplining of state high courts. That basis is substantive; here is the real utility of a case like *Bouie v. City of Columbia*,[76] to the concurring opinion. Ironically, the decision continues the trend started by the Warren Court to federalize, at least by negative implication, all state law under the Fourteenth Amendment, including the law that the *Bush II* per curiam opinion tells us is within the sole purview of the state legislature under Article II.[77] That federalization vests the Supreme Court with the authority to pass on the actions of them according to any branch of state government and to judge the general principles of constitutional law, including but not limited to those principles of fairness set forth in the

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75. *See generally* Larry Catá Backer, *Fairness as a General Principle of American Constitutional Law: Applying Extra-Constitutional Principles to Constitutional Cases in Hendricks and M.L.B.*, 33 TULSA L.J. 135 (1997) (discussing the efforts of the U.S. Supreme Court to construct extra-constitutional principles of constitutional law, and the assertion of its power to review all governmental action on the basis of these norms).

76. 378 U.S. 347 (1964). For a discussion of the intersections of race and the jurisprudence of *Bush II*, see *infra* Part V.

77. Indeed, the thrust of the concurrence of the Chief Justice was based on this notion. *See Bush II*, 531 U.S. at 112-13 (Rehnquist, C.J., concurring). The Chief Justice borrowed from *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the idea that the due process clause of the Fourteenth Amendment provides the Supreme Court with authority to void any state supreme court statutory interpretation that can be characterized as "legislative" and therefore, non-judicial, that is, when it appears too novel. *Id.* A recent commentary on *Bouie* noted:

> Had the Court been reviewing a federal court's construction of a federal statute, it probably would have employed standard tools of statutory construction to reverse the court's interpretation and construe the statute more narrowly. But the Court did not have that option in *Bouie*. As a matter of statutory interpretation, the United States Supreme Court generally accepts as controlling a state supreme court's construction of the laws of that state. Thus, even if the *Bouie* Court thought the South Carolina courts had misinterpreted their trespass statute, it was beyond the Court's ken to tell South Carolina how to read its own laws. Unable to adopt its own reading of the statute, the Court instead engaged in a kind of damage control: It invoked the Due Process Clause to constrain the retroactive application of the state's reading. *Bouie*, therefore, may tell us more about the specific power of federal courts to impose due process limits on state courts' application of their own laws than it does about the full scope of the fair warning requirement in federal criminal cases.

Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 477-78 (2001). Rehnquist's concurrence in *Bush II* follows almost naturally: "What we would do in the present case is precisely parallel: Hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II." *Bush II*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

Fourteenth Amendment.[78] Thus, irrespective of the Florida Supreme Court's authority to interpret state legislation, its determination and construction of the statute does "not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right" to vote under the federal equal protection clause.[79] Indeed, state supreme courts, reduced to little more than the inferior courts of the federal court system, may be distinguished from federal circuit courts of appeal only by reference to their subject matter jurisdiction.[80]

Yet, one can argue that this argument states the obvious. For years now, when it has suited its members, the Supreme Court has stated that the highest organ of the federal judicial branch has always had the power to treat all matters of local and state law, even those touching on powers never delegated to the federal government under the federal

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78. Justice Breyer well captures the essence of the change:

> Petitioners invoke fundamental fairness, namely, the need for procedural fairness, including finality. But with the one "equal protection" exception, they rely upon law that focuses, not upon that basic need, but upon the constitutional allocation of power. Respondents invoke a competing fundamental consideration – the need to determine the voter's true intent. But they look to state law, not to federal constitutional law, to protect that interest. . . . And the more fundamental equal protection claim might have been left to the state court to resolve if and when it was discovered to have mattered. . . . The Constitution and federal statutes themselves make clear that restraint is appropriate. They set forth a roadmap of how to resolve disputes about electors, even after an election as close as this one. That roadmap foresees resolution of electoral disputes by *state* courts. . . . But it nowhere provides for involvement by the United States Supreme Court.

Bush II, 531 U.S. at 153 (Breyer, J., dissenting).

79. *Id.* at 105. While interesting and important in its own right, this article does not address the application of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, though the Supreme Court has arguably broken new ground in this area as well.

80. Even putting aside the arrogance and condescension of the speaker (a former law clerk to Chief Justice Rehnquist), consider the construction of judicial hierarchy assumed in the following exchange:

> KONDRACKE: Why couldn't they have just left this to the political branches of government, the Florida legislature, and then ultimately the Congress of the United States? MAHONEY: Well, I don't think that would have been appropriate because the errors that had been committed here were by a lower court. The Florida Supreme Court is subject to review under our constitution by the United States Supreme Court. And so it really was the job of the U.S. Supreme Court to correct those errors. In fact, I think that the United States Supreme Court really did a service to the Florida Supreme Court because the one thing we really don't like is to have confrontations between the judicial branches of government and the legislative branches. And that's really where we were headed.

Fox News Network, *The Beltway Boys*: Interview of Maureen Mahoney by Mort Kondracke (Fox Television broadcast, Dec. 16, 2000 (Transcript # 121604cb.257)).

Constitution, as pregnant with issues of federal constitutional law. *Cooper v. Aaron*,[81] for example, is a modern case in point. In *Cooper*, *Bush I, and Bush II*, there were significant issues of power at stake. *Cooper* was decided in a context in which the very power of the Supreme Court was challenged. *Bush* was decided in the context of a political battle to determine control of the machinery of elections, and thus, indirectly, the control of the power to appoint members to the judiciary.[82]

However, there are differences and ironies between those cases and the *Bush* decisions. *Cooper* is understood as being less extensive than a breezy reading of the opinion might suggest.[83] Traditionalist jurists and prominent members of the federal government have argued that the dicta in *Cooper* has never been accepted as reflecting a *common* understanding of the authority of the federal judiciary.[84] Yet, to the chagrin of many traditionalist jurists, including several of those signing on to the concurrence in *Bush II*,[85] the Supreme Court in the second half

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81. 358 U.S. 1, 4 (1958) (discussing the resistance to *Brown* by the Governor of Arkansas who aided the efforts of the Little Rock School District to resist racial integration). The decision has found supporters within the legal academy. *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997).

82. This power to appoint members to the judiciary has been a significant political question in this country since the appointment of John Marshall by the Federalist party at the dawn of the Republic. The story of the midnight appointment of John Marshall to the Supreme Court by a dying Federalist administration eager to preserve what power it could through the courts is well known. *See, e.g.*, BERNARD BAILYN ET AL., 1 THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE 350 (1992).

83. *See, e.g.*, Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 79 (1993); David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31; MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 182 (1999).

84. *See, e.g.*, Edwin Meese, III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987). Commentators representing conflicting political and jurisprudential camps have echoed the concerns of Ronald Reagan's Attorney General. *See, e.g.*, Harold J. Krent, *The Supreme Court as an Enforcement Agency*, 55 WASH. & LEE L. REV. 1149, 1188-1201 (1998); John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 372-74 (1988); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 228-62 (1994); Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071, 1075-78 (1987). The structural tensions highlighted by the aggressive language of *Cooper* now extend to other areas of intergovernmental conflict. *See, e.g.*, Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479 (2000).

85. In particular, besides the Chief Justice, Justices Thomas, O'Connor, and Scalia have been at the forefront of the current crop of judges urging restraint by the judiciary and a more modest role for the court in the political sphere. *See, e.g.*, Bob Jones University v. United States, 461 U.S. 574, 612 (1983) (holding that a university practicing

of the twentieth century has not been above applying the *Cooper* dicta in matters of aggressive constitutional interpretation.[86] But therein lies a great irony. Jurists at the forefront of disavowing the broadest reading of *Cooper* have now effectively cast the dicta of *Cooper* into the essence of the holding in *Bush II*. Here is a great example of short-sighted revenges of political venality, using the weapons of jurisprudential opponents against their authors, with significant collateral effect on national institutions. The arrogance of judicial lawmaking wielded by the hands of those who had stood for so long as the champions of judicial restraint. The additional irony in *Bush* placed the dissent in the position of rejecting the more far-reaching implications of *Cooper*.

There is no doubt those pushing *Cooper* to its limits will attempt, like those responsible for *Cooper*, to draw back. After all, *Cooper* was decided under a unique set of facts: the desegregation battles of the

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disfavored discrimination cannot have tax exempt status). "As this Court has said over and over again, regardless of our view on the propriety of Congress' failure to legislate we are not constitutionally empowered to act for it." *Id.* For an interesting case in this regard, see the Chief Justice's opinion in *Nixon v. United States*, 506 U.S. 224 (1993), which severely limited judicial role in federal impeachments. It may provide insight into the Chief Justice's willingness to extend the power of the Supreme Court in the context of resolving the victor of the recent Presidential elections, or conceivably his sacrifice of long-held beliefs on the altar of other needs.

The concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards which may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch. *Nixon*, 506 U.S. at 238. Ironically, Justice Souter in concurrence suggested that the Court, and not constitutional text, was the real arbiter of judicial action in a particular case. He suggested that "[i]f the Senate were to act in a manner seriously threatening the integrity of its results. . . judicial interference might well be appropriate." *Id.* at 253-54 (Souter, J., concurring).

86. Just recently, the Chief Justice authored an opinion in which he used *Cooper v. Aaron* to justify or explain a holding that the federal Violence Against Women Act of 1994 exceeded Congress' power under the Fourteenth Amendment. United States v. Morrison, 529 U.S. 598, 616-17 n.7 (2000).

> It is thus a "permanent and indispensable feature of our constitutional system" that "'the federal judiciary is supreme in the exposition of the law of the Constitution.'"
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> No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury*, this Court has remained the ultimate expositor of the constitutional text. As we emphasized in *United States v. Nixon*: "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. . . Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury* that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"

Id. (citations omitted).

middle of the twentieth century. *Bush II* was also decided under equally unique circumstances. Yet, the language of the decision and the actions of the Court stand. They are memorialized and have become, in the words of the Supreme Court itself, the supreme law of the land.[87] These words stand ready to give comfort to those who deem it necessary to exploit them under another set of "unique" or "important" circumstances.[88] Just as the judicial detractors of *Cooper* used the teaching of that "unique" case to craft *Bush*, so will some future court use the teaching of *Bush,* another "unique" case, to craft yet another difficult or unique case.

III. NEGATIVE FEDERALISM

The use of the Constitution as a direct limitation on the republican character of state government,[89] and in *Bush II* on the distribution of power within state government, further consolidates current constitutional understandings based on a presumption. It presumes that states have no power other than that permitted under the Constitution. Just as the *Bush* Court uses *Cooper* to construct a doctrine of "negative federal question" and to expand federal judicial supremacy, the *Bush* Court uses the issue of Florida election laws to extend the supremacy of federal institutions over those of the states. Here, the implications of

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87. In 1803, Chief Justice Marshall, speaking for a unanimous Court, referred to the Constitution as "the fundamental and paramount law of the nation," and declared in the notable case of *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system.
Cooper v. Aaron, 358 U.S. 1, 18 (1958).

88. We should not be surprised. Lawyers have been weaned on Alexis de Tocqueville's observation, elevated now to an incantation, that "[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one." The result is the creation of a judiciary with "immense political power." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 100-01 (J.P. Meyar ed., George Lawrence, trans. 1969).

89. The states inserted into the Constitution language that obligates the federal government to "guarantee to every State in this Union a Republican Form of Government." U.S. CONST. Art. IV, § 4. A Supreme Court of another era, however, determined that the Guarantee Clause was enforceable only by Congress or the President, perhaps by force of arms. Luther v. Borden, 48 U.S. (7 How.) 1, 2 (1849) (questioning the constitutionality of the government of Rhode Island). As a result, federal regulation of state government has found a conceptual home in the Equal Protection Clause of the Fourteenth Amendment. The *Bush II* decision represents a further extension of the power of this clause in the regulation of states.

McColloch v. Maryland[90] are at their limit. Here is *U.S. Term Limits, Inc. v. Thornton*[91] stretched in the service of the national government by those most firmly opposed philosophically to that enterprise.[92] Here, we reap the whirlwind unleashed by the so-called progressivism of a generation ago, the election cases.[93] Here, the politics of revenge find great irony – the members of the Supreme Court most bent on undoing the American vision most clearly expressed in the nationalization of American life after World War II use the most detested jurisprudential tools of that federalization to expand the basis of federal authority over states. In doing so, they reach a decision whose outcome reaps political revenge against the faction of the American elite held responsible for the detested federalization. The effect is operatic.

In *Bush II*, members of the Supreme Court declare, as settled law, the notion that the Constitution directly grants power to certain institutions of state government.[94] Of course, it flies in the face of both history and the construction of the American federal system to assume that power flows down from the federal government to the states, and thereafter, if at all, to the people. Traditionally, Americans were careful to speak of

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90. 17 U.S. (4 Wheat.) 316, 326, 334 (1819) (upholding the validity of federal chartering of banks, voiding a state tax on federal instrumentalities, and proclaiming a broad view of federal power as against the states).

91. 514 U.S. 779 (1995). A divided Supreme Court determined that the federal government, not the states, had authority to impose term limits on federal elected officials. *Id.* at 837.

92. Ironically enough, the dissenters in *U.S. Term Limits*, who had vigorously supported the authority of states as against the federal power, were those who in *Bush II* applied the rationales of the majority in *U.S. Term Limits* to limit the power of states with respect to federal elections. The members of the majority in *U.S. Term Limits* took a more state-friendly position in *Bush II*. Here, one sees the politics of revenge at work on the Court. Consider the delights of the *Bush II* concurrence stretching the rationales of the majority opinion in *U.S. Term Limits* to effect a result anathema to the *U.S. Term Limits* majority. As an exercise in personal power politics, the result would be most satisfying to the players on the Court who won this round.

93. The election cases were based on application of the Equal Protection Clause of the Fourteenth Amendment – the same provision found to be critical to the determination of the *Bush II* decision. *See* Baker v. Carr, 369 U.S. 186 (1962) (finding a state apportionment question justiciable on equal protection grounds); Reynolds v. Sims, 377 U.S. 533 (1964) (limiting states to population-based representation in their legislatures); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (finding state freeholder elections prohibited); Carrington v. Rash, 380 U.S. 89 (1965) (holding that a state is prohibited from refusing military personnel based in a state from voting in state elections).

94. Chief Justice Rehnquist states, "If we are to respect the legislature's Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire. . . ." Bush v. Gore, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring).

power flowing up from the people through the states.[95] That, however, is what the Supreme Court has been suggesting to us in the recent cases on federalism.[96] Unless the circumstances suggest a different conclusion,

> [a]s a general rule, this Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.[97]

The effect of this is clear enough to the dissenting Justices.[98] In *Bush II*, the Chief Justice suggests the possibility that federal courts may

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95. Justice Thomas himself reminds us that "[t]he ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting). At least within academia, something like the original split in the Constitutional Convention between those favoring a state-based federal union modified by the political settlement produced by the Civil War, and those favoring a strong central government, remains as sharp as ever. For a flavor of this split, see Michael W. McConnell, *Federalism: Evaluating the Founder's Design*, 54 U. CHI. L. REV. 1484 (1987); Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing A New Approach to Federalism in Congress and the Court*, 14 YALE J. ON REG. 187 (1996); Daniel Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH L. REV. 615 (1995); Charles Fried, *Federalism -- Why Should We Care?*, 6 HARV. J.L. & PUB. POL'Y (1982).

96. This has been especially apparent in recent cases attempting to limit the reach of the federal Commerce Power. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 551 (1995) (determining that the federal Gun-Free School Zones Act of 1990 exceeded federal power). It has also been prominent in cases dealing with federal interference with state governance. *See, e.g.*, New York v. United States, 505 U.S. 144, 149 (1992) (finding federal interference with state waste disposal sites unconstitutional); Printz v. United States, 521 U.S. 898, 902, 935 (1997) (involving imposition on states through the Gun Control Act of 1968).

97. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 76 (2000) (per curium).

98. *See Bush II*, 531 U.S. at 148-49 (Breyer, J., dissenting). Justice Breyer complains:

> The Chief Justice contends that our opinion in [*Bush I*], in which we stated that "a legislative wish to take advantage of [§ 5] would counsel against" a construction of Florida law that Congress might deem to be a change in law, now means that *this* Court "must ensure that postelection state-court actions do not frustrate the legislative desire to attain the 'safe harbor' provided by § 5." However, § 5 is part of the rules that govern Congress' recognition of slates of electors. Nowhere in *Bush I* did we establish that *this* Court had the authority to enforce § 5. Nor did we suggest that the permissive "counsel against" could be transformed into the mandatory "must ensure." And nowhere did we intimate, as the concurrence does here, that a state-court decision that threatens the safe harbor provision of § 5 does so in violation of Article II. The concurrence's logic turns the presumption that legislatures would wish to take advantage of § 5's

consider issues of state separation of powers, without regard to the provisions of the state constitution, where an arguable connection to the federal constitution can be discerned.[99] The promise annunciated in *U.S. Term Limits*, through the broad reading of *McCulloch*,[100] is fulfilled in *Bush II*. The architects of that victory are those who were most vocal in their opposition to the jurisprudence that they subsequently extended in *Bush II*.

The *Bush II* decision continues a trend that has resulted in the transformation of federalism from a system based on limited governmental power being ceded upwards from the states to a system where governmental power is vested in states only by act of the institutions and at the sufferance of the institutions of the national government.[101] *Bush I* suggested that the state legislative power could be exalted over any restraints in state constitutions as long as there was a federal constitutional hook on which to base that authority.[102] Thus, the Supreme Court has created a basis, in future application, for the authority of the federal government to remake the political organization of states, as it sees fit, as long as it comports with an interpreted requirement of the federal Constitution. All of this has been accomplished without the burden of amending the federal Constitution!

> "safe harbor" provision into a mandate that trumps other statutory provisions and overrides the intent that the legislature *did* express.

Id. (citations omitted); *see also id.* at 124 (Stevens, J., dissenting).

99. *Id.* at 114 (Rehnquist, C.J., concurring).

100. *See* U.S. Term Limits v. Thorton, 514 U.S. 779, 801-02 (1995). Justice Stevens took a very broad view of the lessons of *McCulloch* when he argued that states had no authority over federal elected officials, in the same way that under *McCulloch*, the states had no original power to tax federal entities. *Id.* at 802. In neither case did such a power pre-date the Constitution. *Id.* In no case could a state assert an authority it did not have at the time it ceded authority to the federal government. *Id.* at 801-02.

101. For a sampling of academic commentary in this area, see Harry N. Scheiber, *Redesigning the Architecture of Federalism -- An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL'Y REV. 227 (1996); John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 29 (1998); Thomas S. Ulen, *Economic and Public-Choice Forces in Federalism*, 6 GEO. MASON U. L. REV. 921 (1998)

102. *See Bush I*, 531 U.S. at 76. The opinion reads:

> As a general rule, this Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution.

Id. As such, the Supreme Court suggested error in the Florida Supreme Court's opinion, to the extent it might have suggested that the Florida Constitution could circumscribe the state legislature's federal constitutional authority. *Id.* at 77.

Hidden from view, significant change can be effected outside the political process, while appearing to adhere to principles of republican governance at the federal level. The Court here, to advance its own power, adopts a principle of "negative federalism" to rival its negative Commerce Clause jurisprudence and to parallel its construction of a principle of "negative federal question." Every institutional arrangement at the state level is subject to review at the federal level for conformity with the direct and indirect requirements of the Constitution. The *Bush* decisions signal the consolidation of *Baker v. Carr* and its progeny.[103]

Justice Ginsburg, in dissent, highlights the way in which the actions of the *Bush II* majority extend the jurisprudential basis supporting the idea that the federal government is free to use the Constitution as a limitation on the power of the states to order themselves in republican forms of government.[104] Justice Ginsburg explains:

> The Chief Justice says that Article II, by providing that state legislatures shall direct the manner of appointing electors, authorizes federal superintendence over the relationship between state courts and state legislatures, and licenses a departure from the usual deference we give to state-court interpretations of state law. . . . The Framers of our Constitution, however, understood that in a republican government, the judiciary would construe the legislature's enactments. See U.S. Const., Art. III; The Federalist No. 78 (A. Hamilton). In light of the constitutional guarantee to States of a "Republican Form of Government," U.S. Const., Art. IV, § 4, Article II can hardly be read to invite this Court to disrupt a State's republican regime. Yet the Chief Justice today would reach out to do just that. By holding that Article II requires our revision of a state court's construction of state laws in order to protect one organ of the State from another, The Chief Justice contradicts the basic principle that a State may organize itself as it sees fit.[105]

It is clear enough under this reading that, whatever the rhetoric of the Chief Justice and others in defense of state sovereignty may be in other cases, where it is necessary, the Chief Justice is willing to sacrifice his principles along with the sovereign authority of the states.[106]

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103. Baker v. Carr, 369 U.S. 186 (1962); Gray v. Sanders, 372 U.S. 368 (1963); Reynolds v. Sims, 377 U.S. 533 (1964).

104. Bush II, 531 U.S. at 141-42 (Ginsburg, J., dissenting).

105. *Id.* at 141 (Ginsburg, J., dissenting).

106. An interesting case for comparison is *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). In *Bush II*, the Chief Justice, along with Justices Thomas, O'Connor and

Relying on judicial construction of an earlier era, the Chief Justice obliquely suggests that the eighteenth century delegates to the Constitutional Convention conceived an Article II creating severe limitations on the sovereign authority of states to order their own governments.[107] While this seems odd, suggesting this construction on textualist grounds is perhaps worse. Textualist interpretation, as utilized in the *Bush* decisions, brings to mind both the construction of "necessary" in *McCulloch v. Maryland*,[108] and President Clinton's interpretive bravado during his deposition when he sought clarification on what the meaning of "is" is.[109] It suggests a translation of text to suit modern sensibilities that is the hallmark of the progressive schools of constitutional interpretation usually vilified by textualists. It amounts to the kind of lawmaking that poses as interpretation that the Chief Justice found so distasteful when practiced by the Florida Supreme Court.[110]

Scalia took the opposite approach as they had in *U.S. Term Limits*. *See id.* at 845 (Thomas, J., dissenting). Did these Justices use *Bush II* to repudiate their jurisprudence in *U.S. Term Limits*?

107. *Bush II*, 531 U.S. at 112-13 (Rehnquist, C.J., concurring) (discussing McPherson v. Blacker, 146 U.S. 1 (1892)). Justice Stevens reminds the Chief Justice that partial quotes run the ethical risk of misleading the reader. *Id.* at 123 (Stevens, J., dissenting). Justice Ginsburg, in dissent, correctly reminds the Chief Justice that the "Framers of our Constitution, however, understood that in a republican government, the judiciary would construe the legislature's enactments." *Id.* at 141 (Ginsburg, J., dissenting) (citing THE FEDERALIST NO. 78 (Alexander Hamilton)).

108. Chief Justice Marshall explains:

> The word "necessary" . . . has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819).

109. "It depends on what the meaning of the word 'is' is. If 'is' means is and never has been, that is one thing. If it means there is none, that was a completely true statement." William Clinton, video-taped grand jury testimony, August 17, 1998, *in* Thomas Hargrove, *Key Quotes From Clinton's Presidency*, SCRIPPS HOWARD NEWS SERVICE, January 11, 2001, available in LEXIS/NEXIS, News Lib. President Clinton, of course, was severely criticized for attempting what law professors have found so elegant in the hands of the now venerated John Marshall. It seems that context, and the politics of veneration, may be important indeed.

110. *Bush II*, 531 U.S. at 114-22 (Rehnquist, C.J., concurring). It should not have taken Justice Breyer's dissent to remind the Chief Justice and his allies on the bench that questions relating to the election of the President under state procedures are political questions, and that they are appropriately left to the Congress or President. This decision was really more in the spirit of politics than the sort of judging the Chief Justice aspires to as his legacy. *Id.* at 153-55 (Breyer, J., dissenting); *see also id.* at 142 n.2 (Ginsburg, J., dissenting). Justice Breyer attempts to resuscitate the old states' rights jurisprudence of *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) – a jurisprudence clearly now of a bygone age

Here, in the concurrence to *Bush II* is *McCulloch v. Maryland* presented as a perversion.[111] This argument was clearly unnecessary. The Equal Protection intrusion on the ordering of state government, carried over from the election cases of the Warren Court, proved sufficient for purposes of securing a majority in *Bush II*.[112] However, the Chief Justice's concurrence in *Bush II* meant to go farther than the Equal Protection jurisprudence of the election cases would seem to permit.[113]

The Chief Justice, however reluctantly, appears to take on the character of those who his jurisprudence most despises by assuming a theatrical pose – that of a passive yet necessary activism.[114] He asserts that "there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government."[115] Despite protests to the contrary,[116] the Chief Justice has

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and a different sort of political union, one now driven by the political conceptions of the political actors that the current Chief Justice represents.

111. It may be true that the power to elect, like the power to tax, "involves the power to destroy." McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 431 (1819). Even so, the power to elect is in the states, and the power to destroy is in the body to which the election is directed. Thus, "the magic of the word *confidence*" may not provide the necessary quantum of skill to ensure that its deployment does not "carry it to the excess of destruction... [that] would banish that confidence which is essential to all government." *Id.* Still, as Americans have learned since 1789, a little political perversion may not be a bad thing, especially where the perversion of one age becomes acceptable in the next. *Compare* Plessy v. Fergusen, 163 U.S. 537, 550-51 (1896), *with* Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954).

112. The per curiam opinion in *Bush II* was limited only to the equal protection question in which five justices joined. The Chief Justice's concurrence was joined by Justices Scalia and Thomas. It is curious that Justice O'Connor did not join in the concurrence. It is possible that she preferred to remain officially uncommitted and unrestrained for future cases. That sort of conduct accords with her judging style. In an attempt to remain true to his concurrence in *U.S Term Limits, Inc. v. Thornton*, Justice Kennedy joined the per curiam in *Bush II* and declined to join the Chief Justice's concurrence. Justice Kennedy emphasized in *U.S. Term Limits* his willingness to protect federal rights that he deemed unique – even if lodged within states. *Id.* at 838-45 (Kennedy, J., concurring). However, he emphasized the importance of protecting states against federal incursions. *Id.* at 841 (Kennedy, J., concurring). It might well be that the Chief Justice's concurrence constituted the approval of a federal incursion too great for Justice Kennedy.

113. *See* Bush II, 531 U.S. at 111-22 (Rehnquist, C.J., concurring).

114. *See id.*

115. *Id.* at 112 (Rehnquist, C.J., concurring). The Chief Justice and his allies suggest that the Supreme Court must intervene when an issue is important, but to "[c]ount first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires." Bush v. Gore, 531 U.S. 1046, 1047 (2000) (application for stay) (Scalia, J., concurring). The per curiam in *Bush II* suggests that "[w]hen contending parties invoke the process of the courts," the Supreme Court *must* act as referee. *Bush II*, 531 U.S. at 111. The Chief Justice claims that because the Supreme Court considers an issue, it must act. *See id.* at 113 (Rehnquist, C.J., concurring)

made it possible for others, at their leisure, to find within the arcana and lacunae of the Constitution other places from which it can be divined that states were meant to be limited or controlled. Here again, the hint of what is to come is found in *U.S. Term Limits*, now in the control of the traditionalists on the Court, a stretching of the language of Hamilton's nationalist advocacy to suit the needs of federal supremacy.[117]

IV. SUI GENERIS?

It is easy enough to indulge a temptation and to dismiss the arguments presented in this article. Many will embrace the uniqueness of the context in which the *Bush* cases arose. The Court states, "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many

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("We must ensure that postelection state-court actions do not frustrate the legislative desire to attain the 'safe-harbor' provided by § 5."). It is ironic to hear Justice Breyer, in a voice reminiscent of Justice Scalia in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), remind the Chief Justice and his colleagues:

> Of course, the selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election.

Id. at 153 (Breyer, J., dissenting). The Supreme Court itself, however, has created a strong pattern of intervention in political, moral, social, and economic affairs when it has suited the Court. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 537 (1964); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 664-65 (1966); Romer v. Evans, 517 U.S. 620, 623 (1996); Davis v. Beason, 133 U.S. 333, 334 (1890); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Roe v. Wade, 410 U.S. 113, 116 (1973); Heart of Atlanta Motel v. United States, 379 U.S. 241, 261 (1964); Lochner v. New York, 198 U.S. 45, 64 (1905); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 767-68 (1978); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 654 (1990); Saenz v. Roe, 526 U.S. 489, 492 (1999). Though it has on occasion repudiated earlier interventions, it has never repudiated the power to intervene. Thus, the Chief Justice merely mimics his jurisprudential forebearers, though he has spent a lifetime criticizing them. What makes the Chief Justice's efforts stand out in this case is the effect of the mimicry. Here mimicry takes the Supreme Court beyond anything it had attempted or intimated before. The opinions in this case, when added to the others, advances the idea of judicial intervention and provides a basis for changing the relation between the institutions of our national government, on the one hand, and between the institutions of our state and national governments on the other.

116. *See infra* Part IV.

117. Justice Stevens looked to *McCulloch*, *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819), and FEDERALIST NO. 32 (Alexander Hamilton) to suggest that, like the Seventh Amendment, the Constitution as a whole has frozen in time the rights secured thereby. *U.S. Term Limits*, 514 U.S. at 801. In particular, Hamilton suggested that the Constitution guaranteed to states only those powers understood to be exercisable by states at the time of the ramification of the Constitution. *Id.* Moreover, the federal government was not dependent for its existence on the states, but gained its legitimacy directly from the people of the several states. *Id.*

complexities." Thus the Court appears to signal that these cases must be limited to their facts.[118] But the Supreme Court has hardly ever meant what it says, especially when the Court appears to regulate the future use of its decisions. But let us take this position seriously for a moment. Accepting this position suggests that every important decision is likewise unique and thus incapable of being applied in other circumstances.[119] This means that there must exist special rules and special constitutional interpretations for elections and for any other exceptional matter. It also suggests that another set of rules necessarily governs all other ordinary cases. But this suggestion is at variance with traditional notions of stare decisis[120] and the effect of judicial decisions in our *federal* common law system.[121]

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118. *Bush II*, 531 U.S. at 109. "We deal here not with an ordinary election, but with an election for the President of the United States." *Id.* at 112 (Rehnquist, C.J., concurring). Yet, to suggest that Presidential elections are special in the opinion of this Court because the Justices believe the office of the Presidency is important is, in the absence of a constitutional provision to amend the constitutional framework in a way that would amount to the sort of lawmaking that the Court condemned in *Bush I* as beyond the powers of a court – even a supreme court. To suggest that the Supreme Court is different suggests an unsavory and ultra vires assertion of power for which a constitutional amendment is appropriate. Justice Breyer states, "I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary 'check upon our own exercise of power,' 'our own sense of self-restraint.'" *Id.* at 158 (Breyer, J., dissenting) (quoting United States v. Butler, 297 U.S. 1, 79 (1936) (Stone, J., dissenting)).

119. Indeed, this suggestion is at the heart of the approach of at least one current member of the Supreme Court. Justice O'Connor, in particular, has been an outspoken adherent of a technique of judicial interpretation designed to provide maximum flexibility to the court and minimum guidance to the populace, especially in matters of constitutional interpretation. *See* Larry Catá Backer, *The Incarnate Word, That Old Rugged Cross and the State: On the Supreme Court's October 1994 Term Establishment Clause Cases and the Persistence of Comic Absurdity as Jurisprudence*, 31 TULSA L. J. 447 (1996) (examining the manner in which this interpretative process has been used).

> Well, okay, what can provide the answer for Justice O'Connor? That, too, is easy, if somewhat Olympian. Line drawing, she says, will do the trick. It's line drawing that provides our answer, line drawing "based on the peculiar facts of each case." This requires the kind of refined, impressionistic weighing and balancing that only judges, constrained by cultural norms, can apparently apply. "[D]ecision[s must] reflect. . . the need to rely on careful judgment -- not simple categories -- when two principles, of equal historical and jurisprudential pedigree, come into unavoidable conflict."

Id. at 460 (quoting Rosenberger v. Rector & Visitors of the Univ. of Virginia, 515 U.S. 819, 849 (1995) (O'Connor, J., concurring)).

120. In the so-called joint opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Justices attempted to crystalize the idea of stare decisis in a way that both provided for the necessity of following precedent and its understanding of the broad effect of fundamental constitutional interpretations. Where, in the performance of its judicial

Moreover, at its extreme this viewpoint suggests that the Supreme Court, alone among the branches of government and within the matrix of the American federal system, has the authority to determine what constitutes an exception. In that context, only the Supreme Court has the power to give or to withhold it's imprimatur—post facto—to any action under color of law. The Court's law extends only as far and as long as the Court determines only the Court can divulge the meaning and application of the arcana of constitutional law on a case-by-case basis. Yet, such a position runs counter to the interpretation and legislation doctrine the Supreme Court was at pains to craft. Under this reading, the Supreme Court would have crafted a doctrine of legislative supremacy that trumps even its own interpretive power. If the Chief Justice's new doctrine applies to all courts except the Supreme Court, then the Chief Justice means to take the question of separation of powers

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duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe v. Wade*, and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution. *Casey*, 505 U.S. at 846-47. Justice Scalia scorned this approach when it came to the political result in *Casey*, upholding the fundamental liberty of women to terminate their pregnancies under certain circumstances. *See id.* at 983 (Scalia, J., dissenting) (mocking the joint opinion's discussion by suggesting that stare decisis is inapplicable if the original decision was "plainly wrong"). On the other hand, Justice Scalia has waxed eloquent on the virtues of stare decisis of questionably decided cases that appear to be more in line with his legislative agenda. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989) (Scalia, J., dissenting). The joint opinion stated that this sort of crisis-based norm-setting had occurred only twice in recent memory: *Brown* and *Roe*. *Casey*, 505 U.S. at 863-64. The joint opinion reads its own logic too narrowly in this respect. Both *Brown* and *Roe* stand as representative cases: one for resolution of the extent of personal autonomy liberties and the other for the nature of institutional participation in the race question. Adherence to those cases in the sense of the joint opinion requires elevation of their doctrine to constitutional status of equivalent dignity to constitutional text. That is the essential point of that part of the joint opinion. *See id.* As such, those norm setting opinions cast a net of stare decisis far exceeding the narrow reaches of their particularized holdings. In this sense, *Bush II* follows, if in a perverted way, the precedent of the race cases, exemplified by *Brown*. *See infra* Part V. It thus serves, in its own right, as a part of the interpretive base of the constitutional text significantly broader than its mere technical holding. In this sense, and in this context, the sui generis argument of the Chief Justice makes little sense.

121. Justice Ginsburg reminds her colleagues that "[t]he extraordinary setting of this case has obscured the ordinary principle that dictates its proper resolution: Federal courts defer to state high courts' interpretations of their state's own law." *Bush II*, 531 U.S. at 142 (Ginsburg, J., dissenting).

within the federal government to a new level of confusion or usurpation.[122]

Alternatively, this viewpoint suggests that it is for the national Supreme Court, and no other, to determine when or whether its rules will have any effect. At one extreme, it suggests a civil law approach to the function of the judiciary. Indeed, the Chief Justice's concurrence in *Bush II* suggests a civil law approach to statutory and constitutional interpretation. The idea of interpretation as lawmaking, and judicial lawmaking as non-judicial action, echoes a generalized, though flawed understanding of the limitations of courts in civil law jurisdictions.[123] At the other extreme, it suggests a form of judicial capriciousness that, in other contexts, might be deemed so arbitrary as to violate settled notions of due process.[124] This is a political arbitrariness couched in the language

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122. For a discussion of traditional separation of powers doctrine in federal constitutional law, see Steven Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506 (1989).

123. Indeed, Justice Scalia has made no secret of his view, which sadly is the product of a flawed understanding of the working of civil law systems, that judicial lawmaking is somehow wrong and certainly non-judicial. *See, e.g.*, Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 25-29 (Amy Gutmann ed., 1997). This is not the place to discuss the pathologies of that Justice's error, and from an American originalist perspective, *heresy*. *But see* George E. Bushnell, *The Warren Court and the Legal Profession: Shouldering the Responsibility of a Common Law Legal System*, *in* THE WARREN COURT: A RETROSPECTIVE 285 (Bernard Schwartz ed., 1996). For an elegant description of the realities of civil law judging in France, *see* Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1995); Mitchel de S.-O.-l'E. Lasser, *"Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse*, 111 HARV. L. REV. 689 (1998); *see also* F.L. Morton, *Judicial Review in France: A Comparative Analysis*, 36 AM. J. COMP. L. 89 (1990). For a description of the nature of the approach to interpretation of the German federal Constitutional Court, see SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW: THE PROTECTION OF CIVIL LIBERTIES (1999); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY (1989). For a discussion of the German Basic Law, see Donald P. Kommers, *The Basic Law: A Fifty Year Assessment*, 53 SMUL REV. 477 (2000).

124. The Supreme Court has made much of this form of capriciousness, at least when exercised by (now inferior) state courts. The judicial enactment of a new law of punitive damages, under the guise of interpreting the constitutional guarantees of due process limitations provides a case in point. *See, e.g.*, BMW of North America v. Gore, 517 U.S. 559 (1996) (noting that awarding punitive damages in that case was arbitrary under Fourteenth Amendment Due Process Clause). While the majority imposed a three-part test on state courts for adhering to the new federal constitutional standards for punitive damages under state law, Justice Breyer's concurrence suggested the procedural defects in judicial review of punitive damages awards in Alabama. Id. at 574-76, 586-97 (Breyer, J.,

of the fine distinctions of constitutional law, which ultimately indicates both decadence and irrelevance.[125]

The consequence of the "this is special" argument is the sort of cynicism that leads to a questioning of the Supreme Court's authority to substantially extend the reach of its authority.[126] As Justice Harlan noted in another context, "[a] decision of this Court which radically departs from [the traditions of the nation] could not long survive."[127] The Chief Justice and those standing with him appear vaguely indifferent in this regard.[128] The dissenters at least recognize the danger for the Supreme Court. With more hope than certainty, Justice Breyer worries that

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concurring). As an interesting side point, both Justices Scalia and Ginsburg dissented in *BMW* because of their concerns with the intrusiveness of the decision into matters of state law. *See id.* at 598 (Scalia, J., dissenting); *id.* at 607 (Ginsburg, J., dissenting). In *Bush II*, Justice Ginsburg alludes to the ordinary constitutionally-suspect capriciousness of the per curiam decision. Justice Ginsburg states that "the Court's conclusion that a constitutionally adequate recount is impractical is a prophecy the Court's own judgment will not allow to be tested. Such an untested prophecy should not decide the Presidency of the United States." *Bush II*, 531 U.S. at 144 (Ginsburg, J., dissenting).

125. *See generally* Larry Catá Backer, *Disciplining Judicial Interpretation of Fundamental Rights: First Amendment Decadence in* Southworth *and* Boy Scouts of America *and European Alternatives*, 36 TULSA L.J. 117 (2000). For a recent review of the madness of this method in the area of criminal law, see Norman J. Fry, Note: *Lamprecht v. FCC: A Looking Glass Into the Future of Affirmative Action?*, 61 GEO. WASH. L. REV. 1895 (1993).

> Through some 35 decisions over the next 30 years, the Court found itself constantly reviewing case-by-case circumstances with slightly different factual twists because the "totality of the circumstances" test simply failed to give lower courts, executives, or legislatures clear guidance as to what would, and would not, pass constitutional muster.

Id. at 1900 n.33 (referring to the use of Due Process Clause to determine whether confessions are involuntary and thus violate due process).

126. Whatever the rule of law with respect to the *power* of a court, judicial *authority* is never given, it is earned. Judicial authority can also be lost. *See* Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Interpretive Process*, 20 B.C. THIRD WORLD L.J. 291 (2000).

> [T]he juridical serves as an important site for the production and affirmation of culture. Courts are the great vehicle for the institutionalization of cultural aesthetics on a perpetually grand scale. Courts speak authoritatively only in this sense, but the authority of the juridical in this enterprise of cultural aesthetics is both messy and complex. Society listens and learns because – and only when – it chooses to do so. Society internalizes what it hears to the extent it feels it must. The dynamics of this relationship between speaker and audience is deeply ingrained within ancient cultural patterns of the aesthetics of authoritative voice. To understand the function of law, one must first understand the cultural basis of juridical authority.

Id. at 293.

127. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

128. The per curiam opinion expresses regret for its decision in an odd way:

> in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. We run no risk of returning to the days when a President (responding to this Court's efforts to protect the Cherokee Indians) might have said, "John Marshall has made his decision; now let him enforce it!" But we do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.[129]

Yet I have suggested that it is not the split decision that forms the basis of the danger for the Supreme Court, but the nature of its pronouncement. Justice Stevens, however, is more to the point. He suggests that the decision in *Bush II* "can only lend credence to the most cynical appraisal of the work of judges throughout the land."[130] Ironically, the assertion of authority by the Supreme Court in *Bush I* and *Bush II* might provide a principled basis for future application of the Supreme Court's new doctrine of lawmaking as an extra-judicial act and may invalidate the actions of the Supreme Court itself. The decision in *Bush II*, at least with respect to this teaching, will not be easy to confine to the narrow facts of that case.

V. THE RACE QUESTION

There is another reason the sui generis argument rings false: race. The *Bush* cases are as much about the jurisprudence of racial revenge as they

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> None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.

Bush v. Gore, 531 U.S. 98, 111 (2000) (per curium). A psychologist or linguist might note a bit of a self-satisfied passive-aggressive stance in those words. They suggest the rattlesnake, lying peacefully enough under a rock, that must strike when disturbed. But some might remind the court that its role is not that of the neurotic parent in the American political family striking out in all directions when its power is invoked by those seeking to use the power of the parent.

129. *Id.* at 157-58 (Breyer, J., dissenting) (citations omitted).

130. *Id.* at 128 (Stevens, J., dissenting). Justice Stevens might well have recoiled in horror from the implications of this statement, for himself and the Court, by offering the hope that "[t]ime will one day heal the wound [that was] inflicted by today's decision." *Id.*

might be about the regulation of the election of the President. Their lessons in that regard are both drawn from, and now constitute a part of, a growing jurisprudence in which the structure of government, the nature of our federal system, the scope of fundamental rights, the constitutions of state governments, and the structure of the state are all maneuvered like chess pieces in an infinitely complicated game of race-caste politics. Their lessons will be used and manipulated for the benefit of players on all sides in the socio-political racial and ethnic battles yet to come. The loser, as always, will be the Republic, or at least its ideal as lived. Its structure and character is distorted again and again in the service of the race warriors for whom this Republic is a battleground. In a larger sense, the jurisprudential detritus of *Bush v. Gore* – the continued dismantling of the original federal system and the development of a foundation for parliamentary supremacy at the national level through the creation of the interpretation and legislation binary—is a monument to another great battle in this nation's long and unfinished race war. This should distress us all.

At first blush, these conclusions may appear astonishing. One can almost hear many in the Academy groan "Not again!" on the way to consigning the arguments to the trash heap of dangerous or disruptive ideas.[131] Surely, one can argue that the protagonists in this drama had far more important things on their mind than race.[132] Race and ethnicity were not directly an issue in the case; indeed, race and ethnicity were not even an indirect issue.[133] Besides, many might argue that not everything

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131. For a discussion of the uses and regulation of scholarship focusing critically on the race or ethnicity questions, *see* Larry Catá Backer, *Measuring the Penetration of Outsider Scholarship in the Courts: Indifference, Hostility, Engagement*, 33 U.C. DAVIS L. REV. 1173 (2000).

> Suppression occurs by those time honored methods of social and cultural control – shunning and demonization. To the extent that outsider scholarship can be painlessly co-opted, controlled or radicalized, it can play a useful role in defense of the disciplining of dominant discourse. The courts appear to engage in a healthy dose of demonization – radical feminists, multiculturalists, and particular writers suffer most publicly in this regard. Rejectionist and separatist discourse, served up in a highly demonized form, can be used to scare and intimidate dominant group elites seeking dialogue.

Id. at 1214 (citations omitted).

132. Here again, our ears should be ringing with the Chief Justice's pronouncement: "We deal here not with an ordinary election, but with an election for the President of the United States." *Bush II*, 531 U.S. at 112 (Rehnquist, C.J., concurring).

133. Yet, this is not entirely true. Discrepancies in voting and vote counting appeared to occur disproportionately in areas with high immigrant, aged, and non-majority race populations. *See, e.g.*, Spencer Overton, *A Place at the Table: Bush v. Gore Through the Lens of Race*, 29 FLA. ST. L. REV. 496 (2001) (citing U.S. COMM'N ON CIVIL RIGHTS,

that happens in the United States is touched by the race question.[134] Indeed, those who find this sort of argument ludicrous might continue by saying that race is a stranger to basic questions of the fundamental character of governmental structure in our federal system—at least since the three-fifths rule was purged from the Constitution after the Civil War and the emancipation of the slaves.[135]

Yet, recent scholarship has begun to demonstrate the way in which the race question has had an important effect in shaping of the very core socio-political norms that distinguish us as a nation. Domestic questions of race were intimately intertwined with issues of foreign policy after the Second World War.[136] It has been argued that federal judicial intervention in state criminal law, and in the construction of a modern federal jurisprudence of criminal procedure applicable to the federal and state governments, is directly related to the treatment of African-American criminal defendants in the twentieth century South.[137] It has

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VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION 2 (2001)).

134. This is arguably more appropriately characterized as a voting rights case, one focused on the indirect preservation of the republican character of the states through a finely tuned application of principles derived from the Equal Protection Clause. *See, e.g.*, U.S. CONST. Art I, § 2; Reynolds v. Sims, 377 U.S. 533, 537 (1964); Wesberry v. Sanders, 376 U.S. 1, 8 n.10 (1964).

135. U.S. CONST. art. I, § 2, cl. 3. There were, of course, a number of other core provisions, structural and substantive, meant to incorporate the race caste system into the basic law of the United States. For a discussion, *see* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 1-33 (1996).

136. *See generally* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 205-06 (2000). Professor Dudziak argues that the federal government's efforts in fostering progress in civil rights was substantially a function of the needs of American Cold War foreign policy. The Cold War and considerations of foreign policy both facilitated and limited the character and nature of civil rights progress after the Second World War. Thus, the need to impress foreigners, and especially Third-World foreign governments of color, resulted in a civil rights agenda in which pride of place was given to appearances and formalist progress.

137. *See* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000). Professor Klarman contends:

> [T]he linkage between the birth of modern criminal procedure and southern black defendants is no fortuity. For the Court to assume the function of superintending the state criminal process required a departure from a century and a half of tradition and legal precedent, both grounded in federalism concerns. The Justices were not prepared to embark on such a novel enterprise in cases of marginal unfairness – where the police had interrogated a suspect a bit too vigorously or permitted defense counsel a little less time than optimal for preparing a case. On the contrary, the Court was willing to take this leap only when confronted with cases in which defendants were brutally tortured into confessing or the appointment of defense counsel in a capital case was a complete sham. Such flagrant injustices were not frequent occurrences in the

been said that much of the history of the Supreme Court and its transformation "from tax collector and federal jailer to superintendent of the nation's aspirations for social justice" is little more than the history of the consequences of race for domestic and foreign policy.[138]

Race, directly or indirectly, has touched much of the Supreme Court's participation in the establishment of the dominant position of the national government during the twentieth century. Much of that political restructuring has been race positive. The changes in the scope of the federal commerce power[139] and the taxing and spending powers[140] after the Second World War provide fairly well-known examples. The contests over recognition of a host of liberties in the twentieth century,[141] including the right to vote,[142] have been similarly touched.

United States during the 1920s and 1930s – except in the South, in cases involving black defendants charged with serious interracial crimes, usually rape or murder.

Id. at 48-49.

138. Dennis J. Hutchinson, *A Century of Social Reform: The Judicial Role*, 4 GREEN BAG 2D 157 (2001).

139. Heart of Atlanta Motel v. United States, 379 U.S. 241, 261 (1964) (holding that a federal public accommodations statute was within Congress' Commerce Power); Katzenbach v. McClung, 379 U.S. 294, 304-05 (1964) (holding that a federal public accommodations statute was within Congress' Commerce Power when applied to restaurants).

140. Ironically, a number of cases interpreting the federal authority in the contest of the Aid to Families with Dependent Children Program did much to establish a broad federal authority in the contest of federal programs. *See, e.g.*, Carlson v. Remillard, 406 U.S. 598, 604 (1972) (voiding state rules that denied benefits to the family of a soldier serving in Vietnam because they conflicted with court-interpreted federal welfare eligibility rules); Townsend v. Swank, 404 U.S. 282, 291 (1971) (determining that states had no power to vary the terms of optional programs under federal welfare legislation); King v. Smith, 392 U.S. 309, 333-34 (1968) (interpreting federal welfare rules to preclude Alabama from denying welfare benefits to otherwise eligible children because their mother cohabitates with a man not obligated to support the children).

141. Among these liberties are the right to travel, to marry, and to procreate. *See* Saenz v. Roe, 526 U.S. 489, 510-11 (1999) (holding that the privileges and immunities clause of Fourteenth Amendment protects the right of new citizens to treatment equal to that of older residents); Loving v. Virginia, 388 U.S. 1, 12 (1967) (constitutionalizing the right to interracial marriage); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (subjecting statutes providing for sterilization of criminals to strict scrutiny). Though *Skinner* and *Saenz* were not overtly race-based cases, the racial undertones of both cases were well known.

142. Kramer v. Union Free Sch. Dist., 395 U.S. 621, 622, 633 (1969) (holding that school district elections may not be limited to property owners); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (invalidating poll taxes). Though both cases opened the franchise to the poor in general, both had a significant effect on people of color who were disproportionately represented among the poor.

Yet, the effects of race on the structure of our political institutions are not always directed in race-positive directions.[143] Indeed, many contests over the scope of constitutional protections at the federal level tinge with race and ethnicity. The battles over the establishment of constitutional guarantees of social benefits[144] and establishment of a right to equal education[145] are reminders that resistance to structural changes grounded on general principles of governance, like those seeking a race positive result, also mask the ways in which principle serves as a proxy for conflicts over ethno-racial hierarchy. Even race-positive changes to the basic structure of our federal governmental system have required sacrifices; change has required an offering of the bodies of the oppressed for the delectation of those with the power to effect change.[146] Looking

143. The elevation of the principle of separate but equal in *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896) and the evisceration of the meaning of the privileges and immunities clauses of Art. IV and the Fourteenth Amendment to the federal Constitution in *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873) provide spectacular examples of race-negative uses of structural theory and the federal-state relationship. In the twentieth century, the cases regulating race and ethnicity-based gerrymandering provide a recent set of examples. *See* Miller v. Johnson, 515 U.S. 900, 903 (1995); United States v. Hays, 515 U.S. 737, 739 (1995); Shaw v. Reno, 509 U.S. 630, 633-34 (1993). Affirmative action has a structural component as well. The passage of Proposition 187 in California and the efforts to strike it down on federal grounds suggest another generalizable structural component.

144. Dandridge v. Williams, 397 U.S. 471, 472 (1970). The race and gender sub-texts in debates over social welfare programs are well known. *See generally*, JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994); MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE (1989); Larry Catá Backer, *The Many Faces of Hegemony: Patriarchy and Welfare as a Women's Issue* (reviewing MIMI ABRAMOVITZ, UNDER ATTACK, FIGHTING BACK: WOMEN AND WELFARE IN THE UNITED STATES (1996)), 92 NW. U.L. REV. 327 (1997).

145. *See, e.g.*, San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). The Court stated, "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." *Id.* at 35. In this case, the disproportionately burdened district had a ninety percent Mexican-American and six percent African-American enrollment. The wealthiest district had a non-Hispanic white population of over eighty percent. *Id.* at 12-13.

146. *See* Larry Catá Backer, *Culturally Significant Speech: Law, Courts, Society and Racial Equity*, 21 U. ARK. LITTLE ROCK L. REV. 845 (1999).

> Saints and martyrs, to the extent they are constructed as such by a racializing dominant group, become powerful voices in our cultural conversations. The very act of death translates these figures and their messages into powerful cultural speech. The symbols of that speech go to issues of cultural self-conceptions of fairness. Society's reply to this sort of speech can be considered societal expiation. Penance and contrition have done more to change the judgment of the dominant group respecting the magnitude. . . of the disabilities of race than almost anything else this century.

at *Bush II* through this lens and through this jurisprudential history, invokes the view Lincoln must have had gazing over the battlefields of Gettysburg. Lincoln's address assumes an ironic poignancy as one gazes over the battlefield of *Bush II.*

The insinuation of race into *Bush II's* jurisprudence of revenge is most apparent in the dialogue between the Chief Justice and Justice Ginsburg. This judicial conversation reveals a jurisprudence of revenge based on the use of federal judicial power in the race wars of the mid-twentieth century against the members of the political group deemed responsible for the decisions and their ethno-racial beneficiaries.

Bush II invoked two great battle sites of the mid-twentieth century race wars, *NAACP v. Alabama ex rel. Patterson*[147] and *Bouie v. City of Columbia.*[148] For Justice Ginsburg, both cases are monuments to a unique time in our history when the Supreme Court used itself to control state high courts as it dismantled the institutional structures designed to suppress African-American civil rights.[149] In *Patterson*, the Supreme

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Id. at 861; *see also* Anthony M. Kennedy, *Law and Belief*, 34 TRIAL 22, 26 (July 1998) (noting that the protest actions of people like Rosa Parks "resonate in the American spirit"). Professor Michael J. Klarman of the University of Virginia School of Law has evidenced the cycle of sacrifice in the area of criminal procedure jurisprudence. He states:

> The landmark criminal procedure cases . . . help us to understand this dynamic. From the Civil War through the civil rights movement, it has been easiest to mobilize northern white opinion in support of the rights of southern blacks in response to brutality, violence, and lynching. When southern whites have quietly segregated or disenfranchised blacks, northern whites often have remained relatively indifferent. Brutality and violence, though, they sometimes have refused to countenance.

Klarman, *supra* note 137, at 96. Of course, during the period at issue, northern states were busy assimilating and exploiting their own racialized minorities including Irish, Italians, and Jews. Thus, with a large grain of salt, Professor Klarman's race binary – where north equals good and south equals bad – works. *Cf.* CARL T. ROWAN, THE COMING RACE WAR IN AMERICA (1996).

147. 357 U.S. 449 (1958).

148. 378 U.S. 347 (1964).

149. Professor Angela Harris summarizes:

> Following World War II, the Supreme Court also drastically reduced government power over racial management in the old "social" realm. In a series of cases concerning voting discrimination, the Court struck down state attempts to exclude African Americans from political power by "privatizing" the electoral process. The Court began to find state action when governments colluded with privately owned companies to provide discriminatory services. The Court undermined the practice of writing racially restrictive covenants to protect all white neighborhoods by making them legally unenforceable in *Shelley v. Kraemer* and *Barrows v. Jackson.* The Court restricted the states' ability to persecute civil rights organizations and civil rights demonstrators in several important First Amendment cases. Finally, the Court entered the heart of the "social" realm and held antimiscegenation statutes unconstitutional in *Loving v.*

Court gave itself the authority to interpret Alabama law, correcting what it deemed to be a gross error of interpretation.[150] In the course of the decision, the Supreme Court solidified the modern contours of the First Amendment's freedom of association.[151] In *Bouie v. City of Columbia*, the Supreme Court reversed the application of an interpretation of a state's trespass law by the state's high court; however, it did so on a prospective basis.[152] In reaching each of these decisions, the Court assumed control of the institutional apparatus of the racial caste system in the South.[153] Justice Ginsburg takes some pains to remind us that:

> *Patterson*, a case decided three months after *Cooper v. Aaron*, . . . in the face of Southern resistance to the civil rights movement, held that the Alabama Supreme Court had irregularly applied its own procedural rules to deny review of a contempt order against the NAACP arising from its refusal to disclose membership lists. . . . *Bouie*, stemming from a lunch counter "sit-in" at the height of the civil rights movement, held that the South Carolina Supreme Court's construction of its trespass laws—criminalizing conduct not covered by the text of an otherwise clear statute—was "unforeseeable" and thus violated due process when applied retroactively to the petitioners.[154]

Virginia. White purity was no longer a state interest of constitutional significance.

Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1991 (2000) (citations omitted).

150. *Patterson*, 357 U.S. at 453-57. The Supreme Court determined that the interpretation of Alabama's procedural rules were so novel that it would be unfair to hold the current litigants to that interpretation. *Id.* Justice Ginsburg interpreted the thrust of that case: "We said that 'our jurisdiction is not defeated if the non-federal ground relied on by the state court is without fair or substantial support.'" Bush v. Gore, 531 U.S. 98, 140 (2000) (Ginsburg, J., dissenting) (citing Patterson, 357 U.S. at 455).

151. This case is now cited as important precedent for the establishment of the contours of the First Amendment's freedom of association. "Similarly in the 1950s and 1960s, free speech became intertwined with another substantive cause that was beginning to prosper – the Civil Rights Movement. Again, it is no accident that many of the landmark free speech decisions of the Warren Court emanated from civil rights controversies." Michael Klarman, *Rethinking the History of American Freedom (Review Essay of ERIC FONER, THE STORY OF AMERICAN FREEDOM (1998)*, 42 WM. & MARY L. REV. 265, 272 (2000) (citations omitted).

152. 378 U.S. at 349. The Supreme Court held that the interpretation was unforeseeable and thus violated the due process rights of criminal defendants. *Id.* at 350, 354-55.

153. *See, e.g.*, Seth P. Waxman, *Twins at Birth: Civil Rights and the Role of the Solicitor General*, 75 IND. L.J. 1297, 1310-11 (2000)(discussing the narrow approach of *Bouie*).

154. Bush v. Gore, 531 U.S. 98, 140 (2000) (Ginsburg, J., dissenting) (citations omitted).

But to arrive at these important changes in the treatment of African-American litigants in the state courts of the old Confederacy, the Supreme Court had to break new ground. Each decision effectively treated the state high court like a rogue court and branded the state court holdings as beyond the judicial power of the courts. Additionally, each decision represented an unusual judicial intervention using ordinary law to reimpose the rule of law in a place where it had disappeared. Thus, fairness principles arising from the need for litigants to be made aware of their duties and obligations[155] were stretched to redefine the nature of the republican character of state government.[156] The use of instrumentalities of state government for lawless purposes in the racial war of the states of the old Confederacy required suppression. The decisions in *Patterson* and *Bouie* were two in a large body of cases that provided a jurisprudential basis for intervention in the internal affairs of the states in that context. The pattern was the same as that used to apply principles of equal protection to forcibly reconstitute the internal organization of the states.[157] Therefore, Justice Ginsburg is right in a narrow sense when she says that *Patterson* and *Bouie* were essentially racial.[158]

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155. The problems of prospective and retroactive application of judicial interpretations have a long and inconsistent history. *See, e.g.*, Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455 (2001); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997). The racial focus of *Bouie* is perhaps best understood by the fate of the holding subsequent to its issuance, at least before *Bush II*. Harold J. Krent explains that "the promise of *Bouie* has been largely illusory" as "courts have construed the foreseeability requirement generously" and are inclined to "reverse on *Bouie* grounds only when the judicial change seems entirely arbitrary." Harold J. Krent, *Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 38-39 (1997); Dan M. Kahan, *Some Realism About Retroactive Lawmaking*, 3 ROGER WILLIAMS U. L. REV. 95, 109-10 (1997) ("Against the background of competing regional norms on racial equality, it is not hard to understand why the United States Supreme Court found this exercise of retroactive lawmaking unacceptable, or why the South Carolina Supreme Court did not.").

156. Of course, the Supreme Court could not reach this issue directly. The only remaining tooth of the political question doctrine appears to be the preclusion of the Supreme Court from entertaining directly questions relating to the form of state government. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962).

157. *Id.* at 228-37.

158. *Bush II*, 531 U.S. at 140 (Ginsburg, J., dissenting). Thus, according to Justice Ginsburg, *Patterson* stood merely for the proposition that federal question jurisdiction is not defeated even where the claim is not vindicated, and *Bouie* stood for the proposition that it was unfair in the circumstances to retroactively apply a novel interpretation of a statute. *Id.* Both of the cases are limited to their historical and racialized context out of which broader application is inappropriate. Justice Ginsburg notes:

> The Chief Justice's casual citation of these cases might lead one to believe they are part of a larger collection of cases in which we said that the Constitution

But, in the Chief Justice's hands, the racial essence of those cases finds broad application. In the *Bush II* concurrence, *Patterson* and *Bouie*, cases that are ostensibly sui generis and "embedded in historical contexts hardly comparable to the situation [in *Bush*]"[159] become the means for actualizing the authority of the Supreme Court to the limit of its dicta in *Cooper v. Aaron*.[160] The Chief Justice frees these cases of their racial limitations for use in a case that is itself supposed to be limited to its "unique" context. Each case now becomes the source of principles—the applications of which leads to a broad restructuring of the relationship between state and federal courts and to a narrowing of the character of judicial interpretation. The Chief Justice understands the two cases to stand for the proposition that state court interpretations that deviate too sharply from prior understandings of a statute, or appear to deviate from the plain text of the statute, might be voided as "impermissibly broaden[ing] the scope of that statute beyond what a fair reading provided, in violation of due process."[161] It is this interpretation that the Chief Justice applied to the not-so-novel circumstances of *Bush II*. The Chief Justice stated "What we would do in the present case is precisely parallel: Hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II."[162] These decisions are necessary judicial interventions using ordinary law to regulate the borders of the rule of law. Thus, fairness principles arising from the need for litigants to be made aware of their duties and obligations are stretched to define the nature of the limits of judicial interpretation. This is another instance of liberal interventionist jurisprudence applied against its creators by interventionists of a different political stripe. As a result, the distinction between interpretation and legislation in the jurisprudence of state courts is born.[163]

Yet, by generalizing the principles of *Patterson* and *Bouie* and by liberating those cases from their specific historical contexts, *Bush II* became as much about the politics of race and ethnicity as were *Patterson*

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impelled us to train a skeptical eye on a state court's portrayal of state law. But one would be hard pressed, I think, to find additional cases that fit the mold.

Id.

159. *Id.*

160. 358 U.S. 1 (1958). *See supra* notes 82-89 and accompanying text.

161. *Bush II*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

162. *Id.* Here the Florida Court assumes the character of a rogue court like the courts disciplined in *Patterson* and *Bouie*. *Id.* The form of roguish behavior in this instance is the lawless distortion of the judicial function of interpretation.

163. *See* discussion *supra* Part I.

and *Bouie*. The Justices must have been well aware of the ethnic and racial core underneath the arguments about the character of federalism and the limits of judicial interpretation.[164] At least one amicus brief described anecdotally the problems of voting within Jewish and other minority communities in South Florida.[165] The litigation generated significant publicity about the incidence of voting disparities and race.[166] Opposition to racialization of the election, and its resolution by the courts, ironically, amplified the racial characterization of the election.[167] Political divisions between communities of color also added fuel to the fire.[168] These questions revolved around the nullification of the franchise to communities of color and the results transcend the finality of *Bush II* in the judicial sphere. Thus, five months after the election, ". . . African-American voters in Florida are more likely to view Bush as

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164. The Justices, of course, could decline to read an amicus brief or refrain from reading accounts of the racial and ethnic frustrations that resulted from the way the franchise was burdened. The Justices might even believe that such frustrations were delusional or misplaced. But even then, it is hard to imagine that they would be unaware.

165. *See* Brief of Amici Curiae Disenfranchised Voters in the U.S.A. et al., at 54-55, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000). Rabbi Yellin expressed the sentiment of his congregation to the Justices:

> The media is totally confused by this, and it is no wonder that the former Secretary of State, The Honorable James Baker, could hold up a normal "butterfly," and unconscionably imply that elderly, Jewish, and African-Americans, and Palm Beach County citizens, were "confused" (implying "stupid"). Mr. Baker was not confused because Bush voters were not confused, because their candidate was the first on the list, and you could not mistake punching the Bush "butterfly" hole because it was at the top of the column of holes.

Id.

166. The Reverend Jesse Jackson was quick to voice the view of the African-American community in this respect. *See* Donald Lambro, *Democrats Won't Knock Jackson*, WASH. TIMES, Dec. 13, 2000, at A1 ("He characterized the large number of disputed ballots filled out by black voters as 'a bold attempt to take from people their franchise. . . . I can live under Bush winning, I can't live under Bush stealing"). Investigations after the inauguration of George W. Bush appear to suggest that the franchise of African-Americans might indeed have been burdened. *See* John Lantigua, *How the GOP Gamed the System in Florida*, THE NATION, Apr. 30, 2001, *available at* http://www.thenation.com/docprint.mhtml?i=20010430&s=lantigua ("In all, some 200,000 Floridians were either not permitted to vote in the November 7 election on questionable or possibly illegal grounds, or saw their ballots discarded and not counted. A large and disproportionate number were black.").

167. Mona Charen, *Surveying the Damage*, AM. ENTERPRISE, Mar. 1, 2001, at 5 ("But things really got rolling during the post-election campaign, when Gore, Jesse Jackson, and many members of the Democratic Party manipulated black sensitivities in a grotesque and unforgivable manner.").

168. *See* Ramesh Ponnuru, *Lefty Nation?*, NAT'L REV., Apr. 16, 2001 at Vol. LIII, No. 7 (stating that many believe that "[C]uban-Americans, meanwhile, put Bush over the top in Florida").

illegitimate. In large part, that feeling is because many African-Americans think their votes were the most affected by faulty equipment and other problems on Election Day."[169]

A sense of the enduring strength of the racialized characterization of the proceedings can be gleaned from the continuing effect of the decision among communities of color outside of Florida. At a hearing regarding a request for funding in order to renovate the Supreme Court building, members of the Court were treated to another expression of the continued strong racial and ethnic understanding of *Bush II:*

> "This past year you broke my heart by getting yourselves involved in a political issue," Serrano told the justices. Serrano said his Bronx constituents are overwhelmingly African-Americans and Hispanics and supported Al Gore in the presidential race. "They're angry and bitter," Serrano said. Serrano told the justices that blacks compare the court's decision in favor of George W. Bush to the pre-civil rights battles in the South. And his Hispanic constituents, Serrano added, say the ruling reminds them of the political systems in countries some have fled. "Some of these people feel their rights have been totally trampled on," Serrano concluded.[170]

The racial repercussions continue to be felt, and additional judicial action is possible.[171] The judicial interventions in Florida and Washington have merely redirected the racial focus of the election to the language of the courts rather than the political arena.

Consider some additional ironies in *Bush II.* Justice Ginsburg argues that *Patterson* and *Bouie* are sui generis, applicable only in the extraordinary context of the race battles of the last century.[172] The Chief Justice disagrees and applies the teaching of those two race cases to broadly impose a change in the nature of the relationship between state

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169. Rafael Lorente, *Poll: Most in Florida Say Bush Legitimate; Ambivalence Prevails Toward U.S. Supreme Court, News Media*, SUN-SENTINEL (FORT LAUDERDALE, FL), Apr. 13, 2001, at A1.

170. Jonathan Ringel, *Justices Ask for $ 110 Mil. in Renovation Funds*, LEGAL INTELLIGENCER, Mar. 30, 2001, at 4.

171. *Nation Investigation Reveals Florida Officials Shut Out Tens of Thousands of Black Voters on Election Day*, U.S. NEWSWIRE, Apr. 12, 2001, *available in LEXIS,* Nexis Lib., News file.

> A pending NAACP lawsuit charges Secretary of State Harris and other Florida officials with violating the 14th Amendment and the 1965 Voter Rights Act and demands many reforms to the Florida electoral system. In its March interim assessment, the U.S. Civil Rights Commission said it had uncovered evidence that is likely to lead to "findings of probable discrimination."

Id.

172. Bush v. Gore, 530 U.S. 98, 139-41 (2000) (Ginsburg, J., dissenting).

and federal courts.[173] The Chief Justice also uses the cases to significantly limit the power of judicial interpretation in a case that he argues is sui generis.[174] Election cases may well be exceptional, yet *Bush II* demonstrates once again that race is unexceptional. It continues to serve as the common lubricant of our public law. Race serves as the catalyst, or excuse, for transcendent changes to the American federal state.

As ironic as the sui generis argument is, the Chief Justice uses these early race cases against the beneficiaries of those cases. In the name of equal protection and the new realities of federalism, *Bush II* applied *Patterson* and *Bouie* to foreclose Florida's opportunity to recount ballots that were disproportionately cast by African-American and Jewish voters.[175] In preserving the value of the voting franchise, the franchise itself was made unavailable to those most vulnerable to its loss. For those who viewed the rise of federal power with horror as a consequence of racial or ethnic agitation in the twentieth century, there is a delicious irony in this result.

Bush II is, in part, the house that race built. The race wars of the last century saw the rise of federal power against the states and the individual. The original beneficiaries of that power were those whom the majority had traditionally reduced to second-class status – primarily racial and ethnic minorities. This century opens with a demonstration of the powerful tools used by the race warriors of the last century. Like all tools, they can be used by any group that develops the skills to use them. Further, the utility of the tools are never limited by their original purpose. The history of the Fourteenth Amendment should have taught the American people that lesson.[176] *Bush II* demonstrates that it has.[177]

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173. *See id.* at 114-15 (Rehnquist, C.J., concurring).

174. *See id.*

175. *See id.*

176. Leonard Levy noted:

> The Court has, in fact, proved itself to be most adept in reading into the Constitution values and policy preferences that meet its approval, and its freedom to do so is virtually legislative in scope. As has been remarked so often, the Court sits as a continuous constitutional convention; its duties are political in the highest sense as well as judicial. The history of its treatment of the due process clause is as good an example of this as any. . . .

Leonard W. Levy, *Introduction*, *in* CHARLES FAIRMAN & STANLEY MORRISON, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS: THE INCORPORATION THEORY xvi (1970). It needs little reminding that this provision was originally meant to target newly freed slaves and undo the structural constructions of the old regime. *See generally* Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). The amendment was, however, first used to exclude the newly freed slaves from a large portion of the benefits of the provision. *See, e.g.*, Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873). It was then used to construct a theory of the fundamental rights of economic autonomy. *See, e.g.*, Lochner

The reshaping of the nature and character of the state cannot be confined to the issue that gave rise to the changes. This presents a real danger because the tools of emancipation can be given another character entirely. *Bush II* confirms the importance and utility of race in the remaking of the Republic, but it does so with a coldly ironic nod to the race politics on which it is based.

VI. THE SHAPE OF THINGS TO COME

Felix Frankfurter once remarked that "[i]f the Thames is 'liquid history,' the Constitution of the United States is most significantly not a document but a stream of history. And the Supreme Court has directed the stream."[178] There is now cause for worry among the complacent, no matter how much they have worked to make the decisions in *Bush I* and *Bush II* disappear. What had once been a marginalized position taken by a group of academics, some of whom had been disparagingly characterized as extremists in the legal academy,[179] has now been articulated by members of the Supreme Court itself: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."[180] The Supreme Court has demonstrated, with ironic effect, that its most conservative elements are capable of acting like the most

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v. New York, 198 U.S. 45 (1905). Finally, it was used as a basis for the construction of a host of individual rights.

177. Thus, for example, the aggressive use of the Equal Protection Clause has proven in recent years to be a valuable tool for self-styled progressives. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996). The *Bush II* per curiam opinion is a reminder that the Equal Protection Clause is also valuable for the purposes of self-styled conservatives. Of course, there is a presumption hidden in this footnote – the masking of political opinion within the neutrality of jurisprudential doctrine. But then, cases such as *Bush II* clearly reveal this unfortunate practice of many of our Justices. For an attempt to understand the workings of the politics of jurisprudence, *see* Larry Catá Backer, *Inscribing Judicial Preferences into Our Fundamental Law: On the European Principle of Margins of Appreciation as Constitutional Jurisprudence in the U.S.*, 7 TULSA COMP. & INT'L L.J. 327 (2000).

178. FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 2 (1937).

179. *See generally* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (1993); RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995); Mark Tushnet, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

180. Bush v. Gore, 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting).

distinguished adherents of the critical legal studies movement by translating constitutional text to suit modern times.[181] What had once been unthinkable may well be the basis of the political organization of the United States in the coming century: a federalization based on devolution of authority from the federal government and a shift of interpretive authority from the state to the federal courts and ultimately from the federal courts to the federal legislature.[182]

That these transfigurations are being wrought by the hands of those in the judiciary most loudly professing a respect for the original intent of the founders is distressing enough.[183] The fact that those who take the opposite view also participate in the enterprise of metamorphosis suggests an unconscious complicity.[184] Therefore, it should come as no surprise that their opponents, now eager for ideological control, would use the techniques that had so effectively been used against them in the past. Thus, the jurisprudence of revenge is an apt characterization of the hyper-legal jurisprudence of decadence and change. That both camps pander to the amoral and selfish deeds of those who act as if the Republic is merely a personal extension of themselves insinuates that the transformations hinted at by the *Bush* opinions are irresistible.

The only uncertainty that the future holds is this: into what form will our federal Republic be transformed in the twenty-first century? The cases suggest that American federalism is changing. Deference to states now depends wholly on the largesse of the institutions of the federal

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181. *See* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 800-01 (1983) (translating language of civil rights to support the decision in *Brown*).

182. Many conservatives have bemoaned the change in the nature of our political organization from their own perspectives. *See* Lino A. Graglia, *From Federal Union to National Monolith: Mileposts in the Demise of American Federalism*, 16 HARV. J.L. & PUB. POL'Y 129, 130 (1993). Yet, this transformation is made possible by the activism of both progressives and traditionalists, each pursuing their own political agendas at the expense of the other.

183. Among the first rank of these actors within the judicial realm are Chief Justice Rehnquist and Justices Scalia and Thomas. Justice Scalia's actions are most ironic in the context of these cases. *See, e.g.*, Scalia, *supra* note 123, at 25-29.

184. It was, after all, the so-called progressives who first effectively used the courts to take away from the states the power over their internal governance on the basis of federal principles. The per curiam opinion in *Bush II* takes advantage of this by applying the "one person, one vote" jurisprudence of prior courts to the context of Presidential elections. The per curiam's use of these "liberal" precedents in a new way suggests the means by which the *Bush II* opinions will be used in the future, irrespective of any plea to the contrary in those opinions. *Cf.* LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

government. The cases further suggest that courts may lose their ultimate authority over the legislature. This suggests that the common law system, as the basis of law making in the United States, will disappear in everything but name.

It is common to believe that change comes only from progressive high court jurists who espoused the doctrine of a living Constitution.[185] The adherents of this view have fashioned a great deal of innovation during their time of primacy.[186] The nation now watches these jurists carefully and are attuned to any deviation from traditional values.[187] But the opponents of progressivism offer little difference.[188] The jurisprudence of revenge makes progressives of everyone it touches.

It is important to watch carefully the actions of those who most vociferously protest adherence to ancient tradition. They, like Octavian and his followers in an earlier republic, remain at the forefront of another great transformation of our Republic.[189] This transformation will

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185. I will, at some risk, group within the traditional adherents of this view those commentators now generally classified as process theorists. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). Robert Bork, rightly or not, identifies a number of scholars and jurists as members of this camp. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 187-221 (1990).

186. *See, e.g.*, THE WARREN COURT: A RETROSPECTIVE (Bernard Schwartz ed., 1996). For less flattering descriptions of the work of the Warren Court, see BORK, *supra* note 185, at 69-100.

187. Among the more popular books at the close of the Twentieth Century were those of William Bennett. *See, e.g.*, WILLIAM J. BENNETT, THE DEATH OF OUTRAGE: BILL CLINTON AND THE ASSAULT ON AMERICAN IDEALS (1998). Mr. Bennett has been a significant force in the re-education of American youth and its sensitivity to deviance from conduct norms. *See, e.g.*, VIRTUES FOR YOUNG PEOPLE: A TREASURY OF GREAT MORAL STORIES (William J. Bennett ed., 1993); THE MORAL COMPASS: STORIES FOR A LIFE'S JOURNEY (William J. Bennett ed., 1995). For a less than compassionate review of this effort, *see* JOHN KATZ, VIRTUOUS REALITY: HOW AMERICA SURRENDERED DISCUSSION OF MORAL VALUES TO OPPORTUNISTS, NITWITS AND BLOCKHEADS LIKE WILLIAM BENNETT (1997). For a less passionate commentary, *see* MARTIN E. MARTY, THE ONE AND THE MANY: AMERICA'S STRUGGLE FOR THE COMMON GOOD (1997).

188. The late Bernard Schwartz described this similarity well. *See generally* Bernard Schwartz, *"Brennan v. Rehnquist" – Mirror Images in Constitutional Construction*, 19 OKLA. CITY U. L. REV. 213 (1994). Richard Epstein has made this observation in the context of the contest over the legitimacy of the judicial review of the 2000 presidential election results in Florida. *See* Richard A. Epstein, *Undue Restraint: Why Judicial Activism Has its Place*, NAT'L REV., Dec. 31, 2000, Vol. LII, No. 23, *in* LEXIS/NEXIS, News Lib. Applauding the intervention of the courts, whatever the outcome, he suggests that "[t]he choice is never between restraint and activism; it is, rather, a question of whether the attack against a piece of legislation makes sense in light of constitutional text and structure. It is in this light that we should view the debate over the Supreme Court's role in the Florida controversy." *Id.*

189. The new scholarship on the transformation of the Roman Republic is instructive.

not come about clumsily[190] or directly.[191] The institutions of the Republic are too strong for that. Rather, transformation will come in the form of

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> Fundamental change did not receive consideration. A reconstitution of the social and political structure was unthinkable for *nobiles* and *plebs* alike. Reforms, when they came, were generally piecemeal and unconnected, prompted by ad hoc situations, often induced by considerations of politics rather than humanity or justice. . . . In a sense, the most arresting feature of the late Republic is not lawlessness but an obsession with legalisms. From the time of Sulla on, a mass of resolutions and statutory law interpreted and reinterpreted the *mos maiorum*, setting the context for many of the era's political struggles. . . . It is fitting and instructive that the bewildering wrangle over Caesar's *ratio absentis* and its technical ramifications should have precipitated the civil war itself. Both sides rested their public case on an allegedly strict interpretation of Roman law and proprieties. That fact points up all the more markedly the persistent attention – even when perverted – to constitutional principles and their interpretation. When a crisis developed, it came not from revolutionary action but from dispute about and divergence from traditional procedures. The conventions mattered – they were themselves the agents of tension and conflict that finally engulfed Rome in Civil War.

ERICH S. GRUEN, THE LAST GENERATION OF THE ROMAN REPUBLIC 506-07 (1974). Compare the argument of one of the great advocates of the Republican Party in his assessment of the nature of the decision of the Florida Supreme Court that was ultimately overturned by the U.S. Supreme Court. [Its attempt to throw a presidential election by inventing post facto election law is surely a bridge too far. It begins with the Justices setting themselves up as defenders of the 'will of the people' against what they contemptuously call 'hypertechnical reliance upon statutory provisions,' or what other people call 'adherence to the law.'] Charles Krauthammer, *Our Imperial Judiciary; We Need to Bring a Gavel Down on Arrogant Judges like Florida's Supremes*, TIME, Dec. 4, 2000, at 46.

190. For example, the Rev. Jesse Jackson's protests of vote stealing aside, the politics of vote counting is as old as the Republic. At the close of the 1960 presidential election, the same was said about the irregularities in voting that produced a Democratic victory in the key state of Illinois. The popular press was quick to remind Americans of this parallel and the differences between Nixon's conduct in 1960 and Gore's in 2000. *See, e.g.*, Mike Robinson, *Recount Recalls 1960 Illinois Nixon-Kennedy Race, Fraud Charges*, CHATTANOOGA TIMES/CHATTANOOGA FREE PRESS, Nov. 12, 2000, at A9.

> Before Florida 2000, there was Illinois 1960 and Republican complaints that Chicago Mayor Richard J. Daley and his Machine had stolen the election for Democrat John F. Kennedy. . . . "He was bitter about the fact that the election was stolen and the evidence was pretty conclusive that it was," says Herb Klein, who was Nixon's press secretary on the 1960 campaign trail. "There was no question in his mind that Daley had stolen the election in Illinois." . . . . Nixon said Illinois Sen. Everett M. Dirksen urged him not to concede the election, saying that if he surrendered, ballots and other election records would be quickly destroyed or lost, making a recount impossible. But Nixon, watching developments from a suite at the Ambassador Hotel in Los Angeles, decided that a recount would drag on for months, undermine a Kennedy presidency and foreign policy as well. . . . Some political historians have suggested that another reason Nixon did not challenge the results was that he knew an investigation might also turn up Republican chicanery in southern Illinois and elsewhere.

jurisprudential hyper-legalism, where the precedential value of cases is arbitrarily determined at the whim of politicized jurists[192] and legitimized by popular inaction.[193] Transformation will result by infusing old constitutions with new meaning. Transformation will be effected using the tools of the prior age in order to achieve new or more pronounced effect. In *Bush II*, the legacy of the Warren court's structural constitutional law decisions are apparent. This legacy represents the

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Id. It is clear from popular accounts that the possibile existence of a vengeful satisfaction in knowing that the score is now even in the contest between the political parties over the course of the last half century. The vote-stealing issue may not disappear. John Sweeney, the current President of the AFL-CIO, in a speech to the American Association of Law Schools, characterized the actions of the Republican functionaries in Florida and the subsequent legal action as illustrative of the type of vote stealing followed by litigation that has characterized the way in which management interests have increasingly stolen elections from union organizers. John Sweeney, Speech at the Association of American Law Schools 2001 Annual Meeting (Jan. 5, 2001).

191. Our security agencies are so highly integrated into civilian society that they play a significant role in contemporary politics even as each one appeares to eschew such a role. *See, e.g.*, Dwight D. Eisenhower, Farewell Address, January 17, 1961, *available at* http://eisenhower.
utexas.edu/farewell.htm.

192. This involvement is self-conscious and institutionally self-indulgent. *See* Charles Lane, *Rehnquist: Court Can Prevent a Crisis; Chief Justice Cites 1876 Election Role*, WASH. POST, Jan. 19, 2001, at A24.

> Just weeks after the controversial Supreme Court decision that ended manual recounts in Florida's presidential voting – effectively awarding the White House to George W. Bush – Chief Justice William H. Rehnquist gave a little-noticed history lecture suggesting that sometimes members of the court may have to become involved in political matters to prevent a national crisis. Discussing the role of Supreme Court Justices in a commission that decided the disputed 1876 election in favor of Republican Rutherford B. Hayes, Rehnquist argued that their involvement was vindicated by the results.

Id. For an example of the construction of a jurisprudence of hyper-legalism in the area of free expression and association under the First Amendment, see Larry Catá Backer, *Disciplining Judicial Interpretation of Fundamental Rights: First Amendment Decadence in* Southworth *and* Boy Scouts of America *and European Alternatives*, 36 TULSA L.J. 117 (2000).

193. Professor Jack Balkin has suggested something similar in his discussion of the legitimacy of the recent election in which George W. Bush secured a majority of the electoral votes but Albert Gore secured a majority of the national popular vote.

> Legitimacy, however, is a strange and wonderful thing. If we remember that elections and procedures are not popular will itself but only one particular construction of it, we will understand why there is still cause for hope. Elections are won by rules, but legitimacy is produced through informal popular acceptance. Americans can easily bestow legitimacy on the new president despite the recent shenanigans of the two major political parties. If people make clear that they accept the new government, it will have all the legitimacy it needs.

Jack M. Balkin, *The 'Will of the People' Is a Legal and Political Fiction*, L.A. TIMES, Dec. 11, 2000, at B7.

form of the revenge revolt. This is the means by which race, the Presidential race and the Republic have managed to weave new fabrications. In the name of tradition, the cause of parliamentary supremacy and discretionary federalism may move closer to dominance in this century, benefitting all of the political factions. A highly centralized nation is ultimately easier to control and provides a more powerful vehicle for the recasting of the normative values of American political society.[194] This American Republic would not be recognizable to James Madison or Alexander Hamilton. The institutional forms would appear unchanged, but their substance would be foreign to them. At the end of this coming series of changes, our Republic, tied as strongly as ever to tradition, will be recognizable to the generations that came before it in name only.

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194. Perhaps this is an inevitable precursor to this century's coming battles over control of worldwide trade and migration. Consolidation, harmonization, integration and assimilation appear to be the order of the twenty-first century. Indeed, technology has made it possible to overcome the nation-state as the best site, or the largest efficient space, for communal norm-making. Into the void created by the tugging conflict between the local and the general, the notions of concurrent majorities, nullification, a layering of communities with overlapping powers, sui generis constructions of governance which do not play by the rules, which were categorically rejected in the age of the great nation-state empires and in the United States after 1865, may well be relevant once again. In the regime of growing world-wide migration, emerging ethnic communities, and world wide systems of norm-making in which governance systems become malleable, federalism principles rejected in the great age of the nation-state may well serve as more effective mediating axioms than those designed for the seventeenth century European world. Larry Catá Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173 (2001).